(27,808)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 451.

SANTA FE PACIFIC RAILROAD COMPANY, APPELLANT,

vs.

JOHN BARTON PAYNE, SECRETARY OF THE INTERIOR.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.

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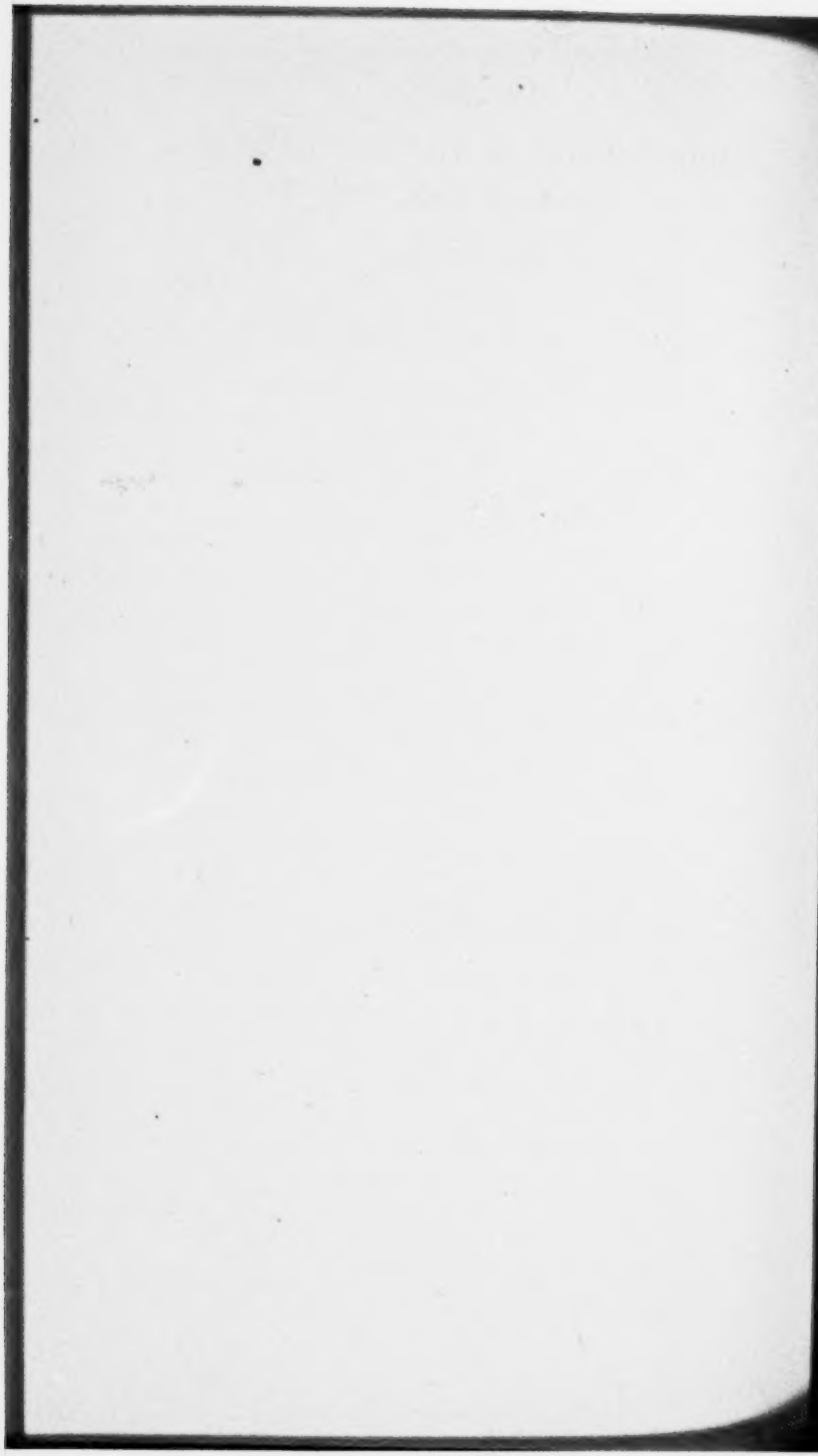


Court of Appeals of the District of Columbia.

No. 3340.

SANTA FE PACIFIC RAILROAD CO., &c., Appellant,

vs.

FRANKLIN K. LANE, Secretary of the Interior.

Supreme Court of the District of Columbia.

In Equity. No. 34974.

SANTA FE PACIFIC R. R. CO., a Corporation, Plaintiff,

vs.

FRANKLIN K. LANE, Secretary of the Interior, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

Bill for Injunction.

Filed February 23, 1917.

In the Supreme Court of the District of Columbia.

In Equity. No. 34974.

SANTA FE PACIFIC R. R. CO., a Corporation, Plaintiff,

vs.

FRANKLIN K. LANE, Secretary of the Interior, Defendant.

To the Supreme Court of the District of Columbia, Holding an Equity Court:

Your orator complains and says:

The Santa Fe Pacific Railroad Company is a corporation incorporated under and in accordance with an Act of Congress approved March 3, 1897, and brings this bill of complaint against Franklin K. Lane, a citizen of the State of California, residing in the District of Columbia, Defendant.

1. By Act of Congress of July 27, 1866 (14 Stats., 292), a grant of lands was made through the then Territory of New Mexico, in aid of the construction of the Atlantic & Pacific Railroad. The line of the Atlantic & Pacific Railroad opposite the tracts hereinafter described was duly constructed and accepted by the President of the United States as required by the said Act of July 27, 1866, and the grant of the lands hereinafter described was duly earned.

2. The Atlantic & Pacific Railroad Company defaulted on its bonds, and the mortgage given was foreclosed and sale effected of its properties. The purchasers under the foreclosure sale
2 organized the Santa Fe Pacific Railroad Company, the same being in accordance with the Act of Congress of March 3, 1897, (29 Stats., 622).

3. By the first section of the Act of April 28, 1904, (33 Stats., 556), it was provided:

"That the Atlantic and Pacific Railroad Company, its successors in interest and its or their assigns, may, when requested by the Secretary of the Interior so to do, relinquish or deed, as may be proper, to the United States any section or sections of its or their lands in the Territory of New Mexico, the title to which was derived by said railroad company through the act of Congress of July twenty-seventh, eighteen hundred and sixty-six, in aid of the construction of said railroad, any portion of which section is and has been occupied by any settler or settlers as a home or homestead by themselves or their predecessors in interest for a period of not less than twenty-five years next before the passage of this act, and shall then be entitled to select in lieu thereof, and to have patented other sections of vacant public land of equal quality in said Territory, as may be agreed upon with the Secretary of the Interior."

4. The SW¼ of Sec. 17, and the N½ of Sec. 27, T. 13 N., R. 19 W., N. M. M., within the Santa Fe land district, New Mexico, are within the primary or place limits of the grant made by the Act of July 27, 1866, supra, to the Atlantic & Pacific Railroad. Said tracts duly passed under said grant, but were, upon the request of the Secretary of the Interior, relinquished under the provisions of the Act of April 28, 1904, supra, in favor of certain small holding claimants, and these relinquishments were duly accepted by the Secretary of the Interior.

5. May 1, 1911, following the relinquishment of the above described lands on the request of the Secretary of the Interior, the Santa Fe Pacific Railroad Company duly filed in the local land office

at Santa Fe, New Mexico, its selection under the Act of April 28, 1904, supra, covering the S½ of Sec. 4, and the NE¼ of Sec. 8, in T. 15 N., R. 19 W., N. M. M.

3 6. Prior to the filing of the said selection on May 1, 1911, both the selected tracts and the relinquished tracts in lieu of which the selection was made, had been duly classified by the Geological Survey, a bureau of the Interior Department entrusted with such matters, the classification showing that both the selected and lieu tracts were coal lands, the value of the products in each being fixed at the minimum price of $20.00 per acre.

7. After the relinquishment and the selection of other lands in lieu thereof as above described, a question was raised as to the value of the coal deposits within the relinquished and selected tracts, and by the decision of the Commissioner of the General Land Office dated May 12, 1913, the selection- of the above described tracts were rejected upon the ground that the base lands relinquished were not of equal quality with the selected lands. From the said action of the Commissioner of the General Land Office in rejecting this selection, the Santa Fe Pacific Railroad Company duly prosecuted an appeal to the Secretary of the Interior, upon which appeal the action of the Commissioner of the General Land Office was reversed by decision of April 30, 1914, with direction that the company's selection be allowed. A copy of this decision is hereto attached, made a part hereof and marked Plaintiff's Exhibit "A".

8. Thereafter, and without notice to the company, the said departmental decision allowing the company's selection was recalled, and based alone upon a subsequent investigation in the field, also without notice to the company or opportunity to be heard re-
4 specting the same, a second departmental decision in this matter was promulgated under date of October 26, 1916, in which the company's selection was rejected, it being said that:

"Under the terms of the act only such lands as may be agreed upon with the Secretary of the Interior as being equal in quality with the base lands may be selected. It being satisfactorily shown that the selected lands are superior in quality to the base lands, the department is unable to approve the selection, and it is hereby rejected."

A copy of this second departmental decision dated October 26, 1916, is hereto attached, made a part hereof, and marked Plaintiff's Exhibit "B".

9. Thereafter, the company moved a rehearing of this matter, a copy of the motion filed being hereto attached and made a part hereof, and marked Plaintiff's Exhibit "C".

10. That by departmental decision of Feb. 13, 1917, the motion for rehearing was denied, a copy of said decision being hereto attached, made a part hereof, and marked Plaintiff's Exhibit "D".

11. That the Atlantic & Pacific Railroad Company duly earned the title to the base lands hereinbefore described, which title passed to your orator under the foreclosure sale, and the provisions of the Act of March 3, 1897, supra; that this title was duly surrendered or relinquished by your orator upon the request of the Secretary of the Interior under the provisions of the Act of April 28, 1904, supra.

That under the last named act, selection was duly made of the lands hereinbefore described, said selection being in full accord with the law and the lawful regulations of the Interior Department, and the same was duly allowed by the decision of the Department of the Interior, and the company has since obligated itself respecting said lands; that the subsequent action of the defendant in disregard to the rights of your orator, is arbitrary and unwarranted, and his threatened cancellation of the selection previously allowed, is without just cause.

And your orator further alleges that it has exhausted every remedy available under the practice before the Interior Department, and that the threatened action of the defendant herein above set forth, unless restrained, will deprive your orator of a valuable part of the land grant heretofore made by Congress, and will further result in the unlawful application and disposition of said lands by the defendant to other purposes and uses than under the grant aforesaid, and seriously interfere with the obligations heretofore undertaken by your orator respecting said land, to its irreparable loss, damage and injury, for which your orator has no adequate remedy at law, and is otherwise remediless, except in equity.

Wherefore, your orator prays:

That your Honor grant to your orator your writ of injunction, enjoining the defendant, Franklin K. Lane, Secretary of the Interior, as aforesaid, and his successors in office and all persons claiming to act under his authority or control, absolutely to desist and refrain from canceling the lawful selection of your orator in partial satisfaction of its grant fully earned, until your Honor shall appoint and direct and order herein; and that upon such hearing the writ herein prayed be granted and continued until the final determination of this suit; and upon such final hearing be made permanent, and that your Honors do command the said defendant, Franklin K. Lane, Secretary of the Interior, as aforesaid, and his successors in office and all persons claiming to act under his authority or control to recall the order for the cancellation of the selection heretofore duly and lawfully presented by your orator, and to refrain from further action respecting the land selected except to issue patent therefor to your orator, to the end that the rights of your orator in the premises may be respected and legally recognized as by the grant provided.

To the end that the defendant may, if he can, show why your orator should not have the relief hereby prayed, and may make full, true and perfect answer, according to the best of his knowledge, remembrance, information and belief, to the several matters hereinbefore averred and set forth, as fully and particularly as if the same

were herein repeated paragraph for paragraph, and he was thereto specifically interrogated (but not under oath, an answer under oath being hereby expressly waived), may it please your Honor to grant unto your orator a writ of subpœna ad responde-m, issuing out of and under the seal of this honorable court, directed to the said defendant, Franklin K. Lane, commanding him to be and appear and make answer unto this bill of complaint, and perform and abide by such order and decree herein as to this Court may seem to be required by the principles of equity and good conscience.

And that your orator may have such other or further relief in the premises as the nature of the circumstances of the case may require.

Respectfully submitted,

BRITTON & GRAY,
ALEX. BRITTON,
EVANS BROWNE,
By F. W. CLEMENTS,
Attorneys Santa Fe Pacific R. R. Co.

Washington, D. C., Feb. 21, 1917.

PLAINTIFF'S EXHIBIT "A."

Department of the Interior, Washington, D. C.

April 30, 1914.

D-24650.
"F."
Santa Fe 015270.
Selection held for cancellation.
Reversed.

THOMAS LEADEN

v.

SANTA FE PACIFIC RAILROAD COMPANY.

Appeal from the General Land Office.

May 1, 1911, the Santa Fe Pacific Railroad Company filed in the local office at Santa Fe, New Mexico, its selection, under the act of April 28, 1904 (33 Stats., 556), for the S/2 Section 4, and NE/4 Sec. 8, T. 15 N., R. 19 W., N. M., selected in lieu of the SW/4, Section 17, and N/2, Section 27, T. 13 N., R. 19 W., N. M. M., Santa Fe, New Mexico, land district. The latter land was duly relinquished under said act. Both the base lands and the selected tracts are alleged to be coal in character of equal quality. Pending publication of notice of the selection, one Thomas Leaden filed a protest against the allowance of said application, on the ground that the lands selected are of greater value than the lands relinquished by the company as base.

October 16, 1911, the case was referred to the Field Service for examination as to the character of the base and the selected tracts. March 2, 1912, a report was received by the General Land Office, in which the inspector states that the lands selected are of greater value, so far as their coal character is concerned, than the lands relinquished as a base, but so far as the topography of the land is concerned, they are apparently of equal quality.

8 From a decision of the Commissioner of the General Land Office, dated May 12, 1913, rejecting said selection upon the ground that the base lands selected were not of equal quality appeal has been prosecuted to the Department.

The act of April 28, 1904, supra, provides that:

> The Atlantic and Pacific Railroad Company, its successors in interest and its or their assigns, may, when requested by the Secretary of the Interior so to do, relinquish or deed, * * * to the United States any section or sections of its or their lands in the Territory of New Mexico, * * * any portion of which section is and has been occupied by any settler or settlers as a home or homestead by themselves or their predecessors in interest for a period of not less than twenty-five years next before the passage of this act, and shall then be entitled to select in lieu thereof, and to have patented other sections of vacant public lands of equal quality in said territory. * * *

Under this act, it appears that the railroad company is entitled to make selection of coal lands of equal quality with those relinquished to small holding claimants. See Santa Fe Pacific Railroad Company (39 L. D., 135).

The value of lands is an element which may be taken into consideration in determining their quality. It appears that both the base and selected tracts have been classified as coal lands at the minimum price, which is equivalent to a finding that they are coal lands of equal quality. This classification by the Government should be considered as determinant in the absen-e of a pertinent and competent showing to the contrary.

The conditions mentioned in the special agent's report, it must be assumed, were all considered and passed upon by the Geological Survey in making the classification of these lands, and the facts therein set forth do not constitute such a showing as would warrant the department in rejecting this selection. As the records of

9 the Department show that the lands selected and the base lands are of equal quality, no good reason appears for rejecting the railroad's selection.

The decision appealed from is accordingly reversed, and the case remanded with directions to allow the selection to go of record.

A. A. JONES,
First Assistant Secretary.

PLAINTIFF'S EXHIBIT "B."

Department of the Interior,

Washington.

D-24650.
"F."

October 26, 1916.

Santa Fe 015270.
Former decision recalled and vacated and lieu selection rejected.

THOMAS LEADEN

vs.

SANTA FE PACIFIC RAILROAD COMPANY.

Appeal from the General Land Office on Reconsideration.

May 1, 1911, the Santa Fe Pacific Railroad Company filed its lieu selection under the act of April 28, 1904 (33 Stats., 556), for the S½ Sec. 4 and NE¼ Sec. 8, T. 15 N., R. 19 W., New Mexico, in lieu of the SW¼ Sec. 17 and N½ Sec. 27, T. 13 N., R. 19 W., relinquished under said act, and base and selected tracts both being alleged to be coal lands of equal quality.

Section 1 of said act reads as follows:

That the Atlantic and Pacific Railroad Company, its successors in interest and its or their assigns, may, when requested by the Secretary of the Interior so to do, relinquish or deed, as may be proper, to the United States any section or sections of its or their lands in the Territory of New Mexico, the title to which was derived by said railroad company through the act of Congress of July twenty-seventh, eighteen hundred and sixty-six, in aid of the construction of said railroad, any portion of which section is and has been occupied by any settler or settlers as a home or homestead by themselves or their predecessors in interest for a period of not less than twenty-five years next before the passage of this act, and shall then be entitled to select in lieu thereof, and to have patented other selections of vacant public land of equal quality in said Territory, as may be agreed upon with the Secretary of the Interior.

On June 27, 1911, Thomas Leaden filed a protest against the allowance of the selection on the ground that the selected lands are coal lands of greater value than the base lands and also that approval of the selection would operate as a monopoly of the coal lands in the vicinity of Gallup.

It appears, however, that action on the case was taken by the Commissioner of the General Land Office by his decision of May 12, 1913, irrespective of the protest, but upon the adverse report of a mineral inspector who examined the lands and reported that while the surface of the respective tracts was of equal quality, being suit-

able only for grazing purposes, yet, the selected tracts contained more valuable coal deposits and for that reason the selection should be denied. The Commissioner in the decision appealed from rejected the selection upon the ground that the selected tracts were superior in quality to the base lands on account of more important coal deposits, as recommended by the mineral inspector.

The case was the subject of department decision of April 30, 1914, upon appeal from the action of the Commissioner, and it was noted that both the selected tracts and the base lands had been classified by the Geological Survey as coal lands and valued at the minimum price. It was considered that that action was equivalent to finding that the respective tracts were coal lands of equal quality. Accordingly, the action appealed from was reversed and the case remanded with directions to allow the selection. However, by departmental order of May 28, 1914, the case was recalled and suspended for further consideration.

11

Since the date of the former departmental decision the lands have been reclassified by the Geological Survey and under date of August 7, 1916, 240 acres of the base lands were classified as coal lands and priced $20 per acre, and 240 acres classified as non-coal lands. On the same day all of the selected lands were classified as coal lands and priced at figures ranging from $62 to $83 per acre, thus showing the superior quality of the lands selected over the base lands. This verifies the report of the mineral inspector.

Under the terms of the act only such lands as may be agreed upon with the Secretary as being equal in quality with the base lands may be selected. It being satisfactorily shown that the selected lands are superior in quality to the base lands, the Department is unable to approve this selection and it is therefore rejected. Accordingly, the former decision is hereby recalled and vacated.

(Signed) BO SWEENEY,
Assistant Secretary.

12

PLAINTIFF'S EXHIBIT "C."

Before the Honorable the Secretary of the Interior.

D—24405, D—24646, D—24647,
D—24648, D—24650, D—24651,
D—24652, D—30565, D—40566.

H. B. JAMISON, LEO R. LEADEN

vs.

SANTA FE PACIFIC R. R. Co., Selector, and VICTOR AMERICAN FUEL COMPANY, Intervenor.

Motion for Rehearing of Departmental Decision of October 26, 1916.

These nine cases each involve a selection by the Santa Fe Pacific Railroad Company under the act of April 28, 1904 (33 Stats., 556).

The selections were filed on May 1, 1911. In the disposition of the cases the Department rendered an opinion in one case as a leading case, namely, D-24650, and ruled the others thereunder.

We hereby move a rehearing in each of the above cases, and are filing herewith a separate motion in case D-24646, in which the grounds on which rehearing is moved and argument in support thereof is made, and we ask that the same be considered in connection with each of these cases covered by this general motion.

13 Before the Honorable the Secretary of the Interior.

D—24646.

Santa Fe Serial 015264. Selection Act April 28, 1904, 33 Stats. 556.

THOMAS LEADEN

vs.

SANTA FE PACIFIC R. R. Co.

Motion for Rehearing of Departmental Decision of October 26, 1916.

Statement.

On the request of the United States the Santa Fe Pacific Railroad Company reconveyed certain lands under the provisions of the act of April 28, 1904 (33 Stats., 556), in order to protect certain small holding claimants, and by the provisions of said act became entitled to select in lieu thereof and to have patented other vacant public lands of equal quality in the then Territory, now State, of New Mexico.

14 The particular selection here in question was filed on May 1, 1911. Prior thereto both the reconveyed and the lands selected in lieu thereof had been classified by the Geological Survey as coal lands and valued at the rate of $20 per acre.

Assuming, therefore, that power exists in the Land Department to classify coal lands with regard to the value of the coal contents differing from the purchase prices as fixed by the coal-land laws, the power had been exercised by the action of the Geological Survey in classifying the lands reconveyed and included in the present selection as of the value of $20 per acre.

As before stated, this was the situation at the time the selection here in question was filed, and it was upon this ground, when the case was first considered by the Department in its decision of April 30, 1914, that it was held that the selection here in question was a proper one.

Thereafter, and because of developments since occurring, a period of more than five years having elapsed since the selection here in question was made, the departmental decision in this case was recalled, and the lands here involved, with the lands included in some seven or eight other selections, were listed to the field for investiga-

tion and report, and this report has been made the basis for a reclassification of both the reconveyed lands and the selected lands.

By this reclassification the selected lands involved in this particular selection have been advanced in price, while the reconveyed or base tract is classified at the former price of $20 per acre, and because of this reclassification the selected lands are found to be superior in quality to the base lands, and the selection is therefore rejected.

In order that one argument may cover all of the several cases, nine in number, decided adverse to the selections under date of October 26 last, we will broaden the statement to include all of the cases, and for that purpose we call attention to the fact that under the
15 reclassification, while the price fixed for certain of the base lands is advanced above the $20 fixed by the first classification, they are uniformly below the price fixed under the new classification for the selected lands taken in lieu thereof, and in some instances the base lands are adjudged to be non-coal.

Grounds upon Which Rehearing is Sought.

I.

In the several decisions rendered in these cases no note or consideration is given to the fact that by the act of July 27, 1866 (14 Stats., 292), granting lands in aid of the construction of the Atlantic and Pacific Railroad, of which the Santa Fe Pacific is the lawful successor, it was specifically provided:

"That the word 'mineral' when it occurs in this act, shall not be held to include iron or coal."

II.

That had the claims, in whose favor reconveyance and relinquishment was made, been held to be superior to rights under the railroad grant, in taking indemnity in lieu thereof, no restriction would have been placed upon such selection merely because of the coal contents of the land, no matter how valuable.

III.

That the act of April 28, 1904 (supra), under which the selections in question were made, must be construed, as in pari materia, with the granting act of July 27, 1866.

IV.

That the reports, both in the Senate and House, when the bill,
which afterwards became the act of April 28, 1904 (supra),
16 was under consideration, show that only a small area was involved; that the claims sought to be protected are particularly meritorious; that because of their early initiation the most valuable

spots had been taken, and that for these reasons special inducements were supposed to have been offered the company, through the act in question, in order to secure its release in favor of the claimants, who, but for such relinquishment, must have been ousted from their possession, long maintained, but after rights had attached under the grant.

V.

In construing the word "quality" as found in the act of April 28, 1904 (supra), as the equivalent of "value," and that in the face of the fact that in a somewhat similar act, passed just seven days before, namely, the act of April 21, 1904 (33 Stats., 211), in providing for an exchange of private lands over which an Indian reservation had been extended by executive order, the selected lands taken in lieu were specifically limited to "vacant, non-mineral, non-timbered, surveyed public lands of equal area and value."

VI.

In failing to note that by the legislation of Congress, respecting the disposition of the public lands, the same had been divided into agricultural for homes; desert for reclamation; and, with regard to the products, into timber, coal, and other minerals, and that by these divisions the qualities of the public lands had become classified irrespective of the particular value of any given tract.

VII.

In failing to note that by the laws providing for the disposition of coal lands, the prices fixed to be paid in the entry thereof, is
17 $20 per acre if within fifteen miles of a completed railroad and $10 per acre where beyond that distance, and that to accede to the power in the Land Department to fix a higher price through classification of the lands, that the power had been exercised by a classification duly made before the selections here in question were filed, and that a selection made in good faith in exchange under the act of April 28, 1904, and in reliance on such classification could not be thereafter rejected solely upon a higher value fixed under a later classification.

VIII.

In failing to note that at the time the selections here in question were made, no land within the Gallup District had been rated higher than $20 per acre; and that purchases made of the selected lands on the faith of such prior classification should not be disturbed after a period of years, assuming the power to make further classification after lands had been regularly selected under such prior classification.

IX.

In assuming that the act of April 28, 1904, invests the Secretary of the Interior with arbitrary power, authorizing him to disregard a lawful selection.

X.

Even conceding in the Secretary of the Interior all the powers claimed under the decisions rendered in these cases, it was unfair to judge, to the prejudice of the selector and his assigns, the quality of the selected lands, based alone upon an examination made by the agents of the United States, without extending to the claimants under the selection the opportunity of a hearing in support of the claimed equality between the base and selected lands.

18 The Law of the Case.

When the original grant in aid of the construction of the Atlantic & Pacific Railroad was made by the act of July 27, 1866, supra, it was evidently the thought of the legislators that deposits of coal and iron would not only be necessary in the construction, but in the continued maintenance and up-keep of the railroad therein provided for. For that reason, it was specifically provided by the third section of the granting act:

"That the word 'mineral' when it occurs in this act, shall not be held to include iron or coal."

The grant specifically excepted mineral lands, the effect of the above provision being to exclude coal and iron deposits from consideration when determining the quality of lands falling within the grant.

The act of April 28, 1904, supra, here under consideration, is to the same grantee and regarding the same subject-matter, and should, by all known rules of construction, be construed as in pari materia with the granting act, and when so construed, coal and iron deposits in the land are necessarily excluded from consideration when determining their quality for purposes under the grant. Not only is this but the application of the ordinary rule of construction regarding laws affecting the same parties and subject-matter, but the actual administration of the grant by the Land Department has been in harmony therewith, for, in acting upon selections made under the act of April 28, 1904, they are regularly included in clear lists submitted to the Department for approval, and when approved become the basis for patents under the grant.

The circumstances calling for the legislation also furnish a peculiar reason in favor of the construction of the law herein contended for.

The act of April 28, 1904, provides:

"That the Atlantic and Pacific Railroad Company, its successors in interest and its or their assigns, may, when requested by the Secretary of the Interior so to do, relinquish or deed, as may be proper, to the United States any section or sections of its or their lands in the Territory of New Mexico the title to which was derived by said railroad company through the act of Congress of July twenty-seventh, eighteen hundred and sixty-six, in aid of the construction of said railroad, any portion of which section is and has been occupied by any settler or settlers as a home or homestead, by themselves or their predecessors in interest for a period of not less than twenty-five years next before the passage of this act, and shall then be entitled to select in lieu thereof, and to have patented other sections of vacant public land of equal quality in said Territory, as may be agreed upon with the Secretary of the Interior."

It was represented to Congress and by the Interior Department, the initial steps for this legislation having originated with the Interior Department, that legislation was necessary to protect a very meritorious class of claims, viz. those of the individual Mexican or Indian who had settled himself and family generally around a water-hole, in the great desert country in the then Territory of New Mexico, seeking for himself and family a home. These, like other Indians, have generally been regarded as wards of the nation, and to the protection of their interests the Congress has always recognized a certain responsibility.

The rights under the railroad grant through this territory had attached to the odd-numbered sections, by reason of definite location, as early as the year 1872, so that about thirty-two years had thereafter elapsed when the legislation in question was enacted. Without this legislation, where these small holding claims included a part of an odd-numbered section within the railroad grant, the claim must have given way to rights under the grant, and it was therefore the desire of the legislators, as shown by the reports made upon the bill, to offer an inducement to the railroad company to relinquish its claim in favor of these poor unfortunates. (See Senate Report 1905, and House Report 1203, 58th Congress, 2d Session.)

We take it that it will be readily admitted that had these claims been superior to the grant, and thereby served to except the lands so occupied from the grant, the company could have taken as indemnity, in lieu thereof, lands without regard to coal contents, no matter how valuable.

It may not be inappropriate, in this connection, to call attention to the fact that the relinquishments made by the railway company under this act are solely in the interest of the individual occupant, long resident upon the land, and that upon such relinquishment the occupant takes title to the land occupied, without regard to the value of the coal deposits.

The thought, therefore, in the mind of the legislators when considering this legislation was, as before stated, solely the protection of the individual occupant in the land occupied. There was no thought of exchanging property with the railroad company for the use or to

the benefit of the United States, and, therefore, the reason for exacting an equal value in the land selected was not present.

This act was under consideration by the Department in 1910, when considering the question whether lands valuable for coal might be patented the individual on relinquishment by the railroad company, and it was said the Congress knew that the railroad company acquired title to coal lands under its grant, and as the act provided that the company may relinquish any section acquired under the grant occupied by a small-holding settler, there was no reason why coal lands relinquished might not be patented the settler.

Where then is the basis for the reasoning that the settler can take the lands relinquished without regard to coal deposits, and yet the company, entitled to coal lands under its grant, must prove
21 the coal values in both the lands relinquished and selected in order to exercise the inducement offered for relinquishing in order to protect the small-holding claimant.

It was no inducement to the company to surrender its lands in favor of these small-holding claimants, especially where known to possess values for the coal deposits, and take in lieu thereof a more limited right than was extended under the original grant by way of indemnity. To so construe the right granted under the act of April 28, 1904, is clearly then not to the purpose of the legislation as understood by the legislators.

Again, prior to the act of 1904, location alone had determined the price to be paid for coal lands, as hereinafter shown, the classification of the coal deposits in the lands not having been determined upon by the executive branch of the Government until some years later. We contend, therefore, that the granting act and the act of April 28, 1904, must be construed as in pari materia, and that when so construed the value of the coal deposits in the surrendered and selected tracts do not enter into the computation when determining their quality.

Legislative Division of Lands for Purpose of Disposition.

The legislation of the Congress respecting the disposition of the public lands, while dividing the same for disposition into agricultural, desert, timber, coal and other minerals, uniformly provides for the disposition of each separate class without respect to the particular value any given tract may have or be put to. Thus, a tract adjoining a townsite and one in the remote wilderness are both disposed of under the homestead laws in one and the same manner, and a mineral claim for the basest metal is disposed of in the same manner, at the same rate, as is the tract containing deposits of the rarest metal.

In only two instances has location of the land given a
22 higher price than the minimum. (*a*) Reserved sections along the lines of railroads, aided by a land grant, are increased to double minimum price, or $2.50 per acre, but the tracts immediately adjoining the railroad and at the extreme limit of the grant are reckoned at the same price and disposed of in the same

manner; (*b*) in the case of coal lands, those within fifteen miles of constructed railroad are priced at $20 per acre, without respect to the deposits, but merely by reason of their location with regard to the railroad, and those beyond, sixteen or six hundred miles, are priced at the rate of $10 per acre for the purposes of disposition.

In one particular instance has value of the land sought in exchange been made a limit upon selection, and that in the case of the act of April 21, 1904 (33 Stats., 211), by which act, in providing for an exchange of private lands over which an Indian reservation had been extended by executive order, the selected lands taken in lieu are specifically limited to "vacant, non-mineral, non-timbered, surveyed public lands of equal area and value."

With regard to the possessions falling within the operation of the act of April 21, 1904, the Government was under no obligation other than the fact that private holdings had been brought within the limits of an Indian reservation. This fact was found sufficient, however, to authorize an exchange with persons so circumstanced, but in providing for the exchange, particular limitations were placed upon the lands which might be taken in exchange, and, in this respect, the lands surrendered and selected are required to be of equal area and value.

It is particularly significant that the same committees of Congress had under consideration the legislation incorporated in the acts of April 21, 1904, and April 28, 1904, at one and the same time, the date of the passage of the two acts being but seven days apart,
23 and it must be clear, without recourse to the rules of construction, that the limitations of the two acts are not, and were not intended to be, the same.

The plain effect of the decisions here under rehearing, is to construe the word "quality," as found in the act of April 28, 1904, as the equivalent of "value," and in determining the value, to take into consideration the coal deposits found in the lands relinquished and selected, which deposits were, by the specific provisions of the granting act, to be excluded when determining the quality of lands falling within the grant.

Classification of Coal Lands.

Our previous argument has attempted to demonstrate that the coal contents of the land is not to be reckoned when determining its quality under the act of April 28, 1904. Should the Department, however, refuse to be guided by our construction of the laws, and assuming, but not conceding, power in the Secretary of the Interior to classify coal land according to its coal contents, the facts of this case show that this power was exercised; that the lands in the Gallup coal district were classified by the Geological Survey, the branch of the Interior Department having charge of such matters, and that not only were the surrendered lands and the selected lands included in the selections under consideration duly classified at one and the same price, being $20 per acre, but there were no classifications within this district in excess of that price at the time the selections

here in question were made, so that even if coal contents are to be figured and reckoned with in the calculation in determining the qualities of the surrendered and selected lands, we have a case where the relinquishment of the lands in favor of the small-holding claimant under the act had been requested by the Secretary of the Interior; the company had accepted and made due relinquishment or reconveyance, and made selection of lands in lieu thereof in accordance with their classification, reckoning the coal contents as
24 of the same value with the surrendered lands. This exchange then, was fully completed upon the selection of the lieu lands as long ago as May 1, 1911.

There is no suggestion of fraud, surely not on behalf of the selector, and the selection therefore in every respect met the lawful regulation of the Department at the time it was made. Not only that, but on the protest of individuals that the coal contems was greater in the selected lands than in the surrendered lands a number of the selections were brought to the Department by successful appeals for its consideration, and by the decision rendered it was held that at least the classification of the base and selected lands as of one value gave them equal quality, and therefore met the terms of the act of April 28, 1904. Since then a further investigation has been had, which has evidently taken into consideration developments occurring since 1911. What else, we cannot surmise, but the result is an entirely different classification in the year 1916 of both the base and selected lands, from that returned and approved prior to 1911.

It is our contention that, assuming the right to classify according to the coal contents, rights acquired under a selection made regarding such a classification cannot be affected by a later classification or reclassification of the lands. In other words, that it is the known and accepted condition at the time the selection is filed that must determine the validity and legality of the selection.

Equitable Considerations.

The lands included in the selections in question have been the subject of sale and transfer since the selection of 1911, and those investing their moneys have done so in the light of, and with a knowledge of, the conditions existing at the time the selections were filed. The investment has undoubtedly risen with the transfers, and it might be that large sums have been expended in the purchase and development of these lands in the five years which have
25 . elapsed since the selections were filed. These rights are not referred to or reckoned with in the disposition of the cases in the decisions now under rehearing. Surely such rights should appeal to the equitable side of the Department, and must be reckoned with in the future disposition of these lands, as it will not be assumed that investments so made will be forfeited without contest.

Power of Approval in the Secretary of the Interior Over an Indemnity or Lieu Selection.

It is admitted that the right of selection conferred by the act of April 28, 1904, in lieu of lands surrendered upon invitation of the Secretary of the Interior, is not absolutely in the grantee, but on the contrary is subject to the judicial scrutiny of the Secretary of the Interior before giving approval to the same as the basis for patent, and that by his approval he determines that the surrendered and the selected lands are of equal quality.

We have heretofore contended that in determining the quality of the several tracts of land, the coal contents are not to be reckoned with because of the particular provision regarding coal and iron found in the granting act of 1866, and that if such coal contents are to be reckoned with, the known condition at the time of the selection alone should control, it being the accepted rule that when one has done everything essential, exacted either by law or the lawful regulations of the Land Department, to obtain a right conferred by the Congress, he cannot be deprived of that right through the exercise of discretion vested in the Secretary of the Interior respecting approval of his claim. (See Daniels vs. Wagner, 237 U. S., 547.)

In the leading decision here under consideration, involving Santa Fe Selection 015270, Departmental No. D-24650, it is said, however, in the concluding paragraph of said decision:

26

> "Under the terms of the act only such lands as may be agreed upon with the Secretary of the Interior as being equal quality with the base lands may be selected."

The effect of this holding invests the Secretary with absolute power regarding a selection made under the act of April 28, 1904, and an arbitrary withholding of approval, as the result of which no agreement could be secured, would necessarily deprive the claimant of all rights under the grant.

There is no place in our form of government for the exercise of arbitrary power by a public officer; that he has a judicial discretion to be exercised regarding all indemnity or lieu selections before giving approval thereto we frankly admit, but beyond this we cannot go, and the act of April 28, 1904, does not confer. The rights of a selector lawfully gained by full compliance with law and the lawful regulation of the Department cannot be taken from him through the exercise of an arbitrary act under the guise of a discretion vested in him respecting approval to be given such a selection.

Take the instant case, the company is invited to surrender its title to certain lands in the interest of unfortunates who, without its relinquishment, must lose their all. The company, acting in the spirit of the legislation, relinquishes its title, so that the unfortunates may be protected, believing that its right will vest under a lawful exercise of the right of selection guaranteed by the act under which its relinquishment was filed. Selection is duly made, and of lands

classified as of the same character and value at the time the selection is filed. Based thereon, and in the knowledge of the conditions existing, others have invested. Delay of years occur without action, and the selection is ultimately disregarded after an ex parte reinvestigation of the lands by the Government agents, influenced by what condition, we are not advised, but with the result that an entirely different classification is made of the lands. This reclassification is not with regard to matters and things appearing on
27 the face of the premises, or which may be fixed and reckoned with as a certainty. This is clearly shown by the wide variance in the two classifications, and perhaps a third would be equally variant. The claimants under these selections, made in entire good faith, as hereinbefore indicated, are not even reckoned with, but the selections are adjudged not of equal quality with the selected lands, and thereupon are ordered rejected and canceled.

It was clearly never within the contemplation of the Congress to confer any such power, and, if so, it is without precedent in the legislation by the Congress of the United States.

Claimants at Least Entitled to Rehearing Before Selection is Rejected.

Surely the wide variance between the classification made previous to the selection, and that recently made, suggests the possibility of mistakes, even by the officers of the Government, and this without any suggestion of wrong-doing by either set of officers. Under the circumstances, and with regard to the interests involved, it surely seems that those interested under the selections should at least be afforded an opportunity of a hearing, where the question of the equality of the base and surrendered lands might be inquired into, and those who have heretofore reported on these lands might be placed upon the stand and questioned under oath respecting pertinent matters.

With apology to the Department, we feel we must say that the action taken deprives the claimants of even an opportunity for a hearing before their rights, gained many years ago, are thus summarily disposed of.

The rights built up under these selections, while not involving a great amount of land, are considerable, and we earnestly urge
28 upon the Department a most careful reconsideration of this case, in the light of the presentation herein made, before the final decision of the Department in the premises is given.

Respectfully submitted,

BRITTON & GRAY,
By —— ——,
Attorneys, Santa Fe-Pacific R. R. Co.

CALDWELL YEAMAN,
Of Counsel.

Washington, D. C., Nov. 24th, 1916.

29 PLAINTIFF'S EXHIBIT "D".

Department of the Interior,

Washington.

D-24650.
"F."

February 13, 1917.

Santa Fe 015270.
Rejection of lieu selection.

THOMAS LEADEN

v.

SANTA FE PACIFIC RAILROAD CO.

Motion for Rehearing.

Octboer 26, 1916, the Department rendered decision in the above-entitled case rejecting selection filed by the Santa Fe Pacific Railroad Company May 1, 1911 for the S. ½, Sec. 4 and NE. ¼, Sec. 8, T. 15 N., R. 19 W., N. M. in lieu of the SW. ¼, Sec. 17, and N. ½, Sec. 27, T. 13 N., R. 19 W. A motion for rehearing has been filed by the company.

The selection was made under the act of April 28, 1904 (33 Stat. 556). Section 1 reads as follows:

That the Atlantic and Pacific Railroad Company, its successors in interest and its or their assigns, may, when requested by the Secretary of the Interior so to do, relinquish or deed, as may be proper, to the United States any section or sections of its or their lands in the Territory of New Mexico the title to which was derived by said railroad company through the Act of Congress of July twenty-seventh, eighteen hundred and sixty-six, in aid of the construction of said railroad, any portion of which section is and has been occupied by any settler or settlers as a home or homestead by themselves or their predecessors in interest for a period of not less than twenty-five years next before the passage of this Act, and shall then be entitled to select in lieu thereof, and to have patented other sections of vacant public land of equal quality in said Territory, as may be agreed upon with the Secretary of the Interior.

The respective tracts were investigated in the field by a Government mineral inspector who reported that the tracts selected are superior in quality to the base lands on account of more important coal deposits. Also the tracts were reclassified by the Geo-
30 logical Survey whereby 240 acres of the base lands are classified as noncoal lands, and 240 acres classified as coal lands and appraised at $20 per acre. The selected tracts were classified as coal lands and priced at figures ranging from $62 to $83 per acre. The

Department accordingly held that the lands selected were superior in quality to the base lands and that the exchange was not authorized by the said act which provides that the company shall be entitled to select lands of "equal quality" with the lands reconveyed.

The motion admits that the right of selection under said act is not absolute until the Secretary, in the exercise of judicial scrutiny has determined that the lands conveyed and the lands selected in lieu thereof are of equal quality. But it is urged that in reaching judgment on the question of quality of the respective tracts, no consideration should be given to the coal deposits. This argument is predicated mainly upon the language contained in the company's original grant of July 27, 1866 (14 Stat. 292) which provided: "that the word 'mineral' when it occurs in this act, shall not be held to include iron or coal."

It is contended that the exchange act of April 28, 1904, supra, should be construed as in pari materia with the said granting act, thus eliminating coal deposits from consideration.

If this contention were conceded, the most valuable coal land could be taken in exchange for plain agricultural or grazing land. The terms and conditions for allowance of such selections are set forth in the said act of April 28, 1904, and the Department is not at liberty to ignore any of the restrictions stated therein. It is
31 clear that the only authority for such exchange is to be found in the latter act. Its terms must govern and the granting act may not be invoked to change the terms of the later exchange act. It cannot be that tracts wholly dissimilar and greatly superior in quality to the base lands may be taken in exchange, for the act specifically limits the right of selection to lands of "equal quality" with the lands reconveyed and there is no justification for holding that this expression is without meaning or effect.

It is further urged that, assuming the authority of the Department to consider the coal deposits and to classify and appraise the lands with reference thereto, the lands had been classified at time of selection and the minimum price, for lands so located, fixed thereon; that the selections were made upon the faith of that classification; that other interests have since attached and expenditures made in pursuance of the selections; that it would be inequitable to now readjudicate with reference to a subsequent classification.

In reply to this it may be said, as conceded in counsel's brief, the right of selection is not absolute but is dependent upon final judgment by the Secretary that the lands selected are of equal quality with the lands relinquished. The selection is not effective until approved by the Secretary and patent issued thereon. Until then it is the duty of the Department to take such action as will prevent unauthorized disposal. In the case of Knight v. United States Land Association (142 U. S. 161), Mr. Justice Lamar, speaking for the court said:

The Secretary is the guardian of the people of the United States over the public lands. The obligations of his oath of office
32 oblige him to see that the law is carried out, and that none

of the public domain is wasted or is disposed of to a party not entitled to it.

In that connection he also quoted from the case of Pueblo of San Francisco (5 L. D. 494), which decision he rendered while Secretary of the Interior, viz:

For example if, when a patent is about to issue, the Secretary should discover a fatal defect in the proceedings, or that by reason of some newly ascertained fact the patent, if issued, would have to be annulled, and that it would be his duty to ask the Attorney-General to institute proceedings for its annulment, it would hardly be seriously contended that the Secretary might not interfere and prevent the execution of the patent.

It is further assigned as error that the Department construed the word "quality" as found in the act of April 28, 1904, as the equivalent of "value." But the Department has not so construed the act. The price fixed upon the respective tracts, by the Geological Survey in its classification, was mentioned but only to indicate the difference in quality as found by the mineral experts in that office, and as corroborative of the finding of the mineral inspector in the field. The Department has thus availed itself of the most authentic information known to it in reaching a conclusion respecting the quality of the lands.

Complaint is also made that decision was rendered without first affording the selector opportunity for a hearing. But it is not even alleged that the selected tracts are not superior to the base lands because of the coal deposits contained therein.

The information contained in the record requires rejection of the selection. The motion is accordingly denied.

(Signed) ALEXANDER T. VOGELSANG,
First Assistant Secretary.

33 *Motion to Dismiss.*

Filed October 25, 1917.

* * * * * * *

Comes now the defendant, Franklin K. Lane, Secretary of the Interior, by his attorneys, and moves to dismiss the plaintiff's bill of complaint; and for cause shows:

That plaintiff has not in and by his bill set forth any cause of complaint entitling it to the relief sought or to any relief in equity; that as appears on the face of the bill and the exhibits thereto, plaintiff tendered its selection of lieu land under the act of April 28, 1904, as it was bound to do, to the land department, to the end that if approved it might be agreed to by the Secretary of the Interior; that the Commissioner of the General Land Office, when said selection reached him for consideration, rejected the selection and held the same for cancellation, but upon appeal to the Secretary, the

decision of the Commissioner was reversed and the case remanded with directions to allow the selection to go of record, without, however, approving said selection; that thereafter, to wit, on May 28, 1914, said decision was recalled and the case was returned to the Secretary for further consideration, whereof plaintiff was notified June 5, 1914; that thereafter the base and lieu lands were classified by the Geological Survey—the base lands as valuable for coal at $20 per acre, and the lieu lands as valuable for coal at from $82 to $83 per acre; that thereafter, the defendant in the discharge of the duty imposed upon him by said act of April 28, 1904, on consideration of the entire record, found and determined that the lieu
34 land and the base land were not of equal quality and therefore not subject to exchange under the terms of said act; that thereafter plaintiff appeared before the defendant and filed an elaborate motion for rehearing (plaintiff's Exhibit C) which was adversely determined by the defendant in his decision of February 13, 1917 (plaintiff's Exhibit D); that exercising the discretion reposed in him under said statute, the defendant was unable to agree upon the exchange and held the plaintiff's selection for cancellation; that under the terms of said act, the defendant is constituted the sole and exclusive tribunal to determine whether or not lands offered in exchange are of equal quality with lands selected in lieu of the relinquished base land; that the determination thereof involves the exercise of judgment and discretion and the exercise of said judgment and discretion is not controllable or reviewable by any court in any direct proceeding;

Wherefore, he prays that the bill of complaint may be dismissed with his reasonable costs, and that he may be permitted to go hence without day.

FRANKLIN K. LANE,
Secretary of the Interior,

By His Attorneys, CHARLES D. MAHAFFIE,
Solicitor.

C. EDWARD WRIGHT,
Assistant Attorney.

35 *Motion to Amend.*

(Filed December 5, 1919.)

(Dated May 21, 1919.)

* * * * * * *

Comes now the plaintiff, the Santa Fe Pacific Railroad Company, and asks that it be allowed to amend its Bill or Declaration filed in this case with respect to Paragraph 11, and as amended said paragraph will read:

11. That the Atlantic and Pacific Railroad Company duly earned the title to the base lands hereinbefore described, which title passed to your orator under the foreclosure sale and the provisions of the

Act of March 3, 1897, supra; that this title was duly durrendered or relinquished by your orator upon the request of the Secretary of the Interior under the provisions of the Act of April 28, 1904, supra, and the title to the lands so surrendered has since been passed by the Patent of the United States to the small holding claimant, so that the title so surrendered under the invitation of exchange as provided for cannot be restored to your orator.

That under the last named act selection in exchange was duly made of the lands hereinbefore described, said selection being in full accord with the law and the lawful regulations of the Interior Department, and the same was duly allowed by the decision of the Department of the Interior and the company has since obligated itself respecting said lands; that those contracting with your orator in the purchase of these selected lands have entered into possession
36 and expended large sums of money in exploration and development of the same, and that the subsequent action of the defendant in disregard to the rights of your orator and those claiming under it is arbitrary and unwarranted, and his threatened cancellation of the selection previously allowed is without just cause, being based solely upon a supposed difference in value between the coal deposits in the base and selected lands, and this notwithstanding the granting act of July 27, 1866, supra, specifically referred to in the act of April 28, 1904, supra, provided: "that the word 'mineral', when it occurs in this act, shall not be held to include iron or coal."

ALEX BRITTON,
F. W. CLEMENTS,
Attorneys for Plaintiff.

Dated May 21, 1919.

Motion to amend granted.

WILLIAM HITZ,
Justice.

Decree Dismissing Bill.

Filed November 4, 1919.

* * * * * * *

This cause came on to be heard on defendant's motion to dismiss the plaintiff's bill and was argued by counsel; and thereupon,
37 the court having been fully advised in the premises, it is, this 4th day of November, 1919,

Ordered, adjudged, and decreed that the bill of complaint be and the same is hereby dismissed, with costs to the defendant to be taxed by the Clerk.

By the Court:

WILLIAM HITZ,
Justice.

Whereupon the plaintiff, on the date above mentioned, in open court noted an appeal from the aforegoing decree to the Court of Appeals, and the same is hereby allowed; and the penalty of a bond for costs is hereby fixed in the sum of One Hundred Dollars ($100) with leave to deposit with the Clerk, in lieu thereof, the sum of Fifty Dollars ($50).

By the Court:

WILLIAM HITZ,
Justice.

No objection as to form.
BRITTON & GRAY,
Attorneys for Plaintiff.

Memorandum.

November 20, 1919.—$50.00 deposited in lieu of Appeal Bond.

Assignment of Errors.

Filed November 20, 1919.

* * * * * * *

Comes now the plaintiff, the Santa Fe Pacific Railroad Company, and makes assignment of the following grounds of error in support of its appeal in the above entitled cause from the decree en-
38 tered on the 4th day of November, 1919, dismissing its bill filed in this cause, namely:

I.

That the Supreme Court of the District of Columbia erred in sustaining the motion to dismiss and in entering an order dismissing plaintiff's bill in this cause.

II.

That the Supreme Court of the District of Columbia erred in failing to grant to the plaintiff the prayers of its bill filed in this cause.

III.

That because the Supreme Court of the District of Columbia failed to give any reason in support of the order entered in this cause dismissing the plaintiff's bill the plaintiff alleges error:

(*a*) In failing to hold that the Act of April 28, 1904, (33 Stats. 556), under which selection in exchange was made, on which the plaintiff relies, should be construed as in pari materia with the Granting Act of July 27, 1866, (14 Stats. 292), granting lands in aid of the construction of the Atlantic & Pacific Railroad of which

the plaintiff is the lawful successor, and by which latter act it was specifically provided: "That the word 'mineral', when it occurs in this act, shall not be held to include iron or coal."

(*b*) In failing to hold that the word "quality" as found in the Act of April 28, 1904, is not the equivalent of "value", and that as the surrendered and selected lands each contained coal deposits the value of the several deposits was immaterial.

(*c*) In failing to hold that as the only classification pro-
39 vided for coal lands at the time of the passage of the Act of April 28, 1904, was that made in the coal land law, fixing the price of $20.00 per acre if within fifteen miles of a completed railroad, and ten miles where beyond that distance from a completed railroad (see Section 2347 U. S. R. S.), that even if the coal contents of the land was material that classification alone controls in fixing the quality of a selection when compared with the lieu tract as a basis for the selection under the Act of 1904.

(*d*) In failing to find that as the classification existing at the time the selection here involved was filed placed an equal value on the selected and surrendered lands, it necessarily made the same of equal quality for the purpose of selection even should the word "quality" be construed as the equivalent of "value" in considering coal contents.

(*e*) In failing to find that the status of the selection could not be affected by an attempted change in the classification of the lands occurring after the selection, and

(*f*) In failing to find that the discretion of the defendant with regard to action upon the plaintiff's selection was not arbitrary and could not be exercised to deprive the plaintiff of a right granted under a lawful selection because of a condition of his own creation occurring subsequently to selection.

ALEXANDER BRITTON,
F. W. CLEMENTS,
Att'ys, Santa Fe Pacific R. R. Co.

40 *Designation of Record.*

Filed November 20, 1919.

* * * * * * *

The Clerk will please make up the record for appeal in the above entitled cause and include therein the following:

I.

Original Bill of Complaint, and amendment.

II.

Motion of defendant to dismiss the bill of complaint.

III.

Final decree dismissing bill together with a notation of appeal in open court and fixing penalty of bond or amount of cash deposit on appeal.

IV.

Memorandum as to deposit of cash amount on appeal.

V.

Assignment of Errors by plaintiff.

VI.

Designation of Record.

ALEX. BRITTON,
F. W. CLEMENTS,
Att'ys, Santa Fe Pacific R. R. Co.

Service of copy of the above designation of record on appeal acknowledged this 19 day of November, 1919.

C. EDWARD WRIGHT,
Attorneys for Defendant.

41 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 40, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 34974 in Equity, wherein Santa Fe Pacific R. R. Co., a Corporation, is Plaintiff and Franklin K. Lane, Secretary of the Interior, is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 2nd day of December, 1919.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG,
Clerk,
By W. E. WILLIAMS,
Assistant Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 3340. Santa Fe Pacific Railroad Co., &c., appellant, vs. Franklin K. Lane, Secretary of the Interior. Court of Appeals, District of Columbia. Filed Dec. 10, 1919. Henry W. Hodges, clerk.

In the Court of Appeals of the District of Columbia.

No. 3340.

SANTA FE PACIFIC RAILROAD COMPANY, a Corporation, Appellant,

vs.

FRANKLIN K. LANE, Secretary of the Interior.

Appeal from the Supreme Court of the District of Columbia.

Motion to Substitute as Defendant John Barton Payne, Present Secretary of the Interior, in the Place of Franklin K. Lane, Former Secretary Thereof.

Comes now the Santa Fe Pacific Railroad Company, and suggesting to the Court the resignation of Franklin K. Lane, as Secretary of the Interior, and the appointment of John Barton Payne as his successor, respectfully moves the Court that said John Barton Payne, in his capacity as Secretary of the Interior, be substituted as defendant in this case in the place and stead of said Franklin K. Lane.

As said Lane was made a party solely in his official capacity as Secretary of the Interior, and in order to prevent abatement of the proceeding on appeal as to the Secretary of the Interior, it is respectfully requested that the substitution moved be granted.

SANTA FE PACIFIC RAILROAD COMPANY,
By ALEX. BRITTON,
F. W. CLEMENTS,
Attorneys.

March, 1920.

Endorsed: No. 3340. Santa Fe Pacific R. R. Co., a Corporation, Appellant, vs. Franklin K. Lane, Secretary of the Interior. Motion for substitution of defendant. Court of Appeals, District of Columbia. Filed Mar. 29, 1920. Henry W. Hodges, Clerk.

Saturday, April 3rd, A. D. 1920.

No. 3340.

SANTA FE PACIFIC RAILROAD CO., &c., Appellant,

vs.

FRANKLIN K. LANE, Secretary of the Interior.

On consideration of the suggestion of the retirement of Franklin K. Lane, and the appointment of John Barton Payne, as Secretary of the Interior in the above entitled cause, It is on motion now here ordered by the Court that the said John Barton Payne, Secretary of

the Interior be, and he is hereby made the party appellee in said cause in the place and stead of the said Franklin K. Lane, retired.

Thursday, May 6th, A. D. 1920.

No. 3340.

SANTA FE PACIFIC RAILROAD COMPANY, a Corporation, Appellant,

vs.

JOHN BARTON PAYNE, Secretary of the Interior,

and

No. 3341.

SANTA FE PACIFIC RAILROAD COMPANY, a Corporation, Appellant,

vs.

JOHN BARTON PAYNE, Secretary of the Interior.

The argument in the above entitled causes was commenced by Mr. F. W. Clements, attorney for the appellant, and was continued by Mr. C. E. Wright, attorney for the appellee, and was concluded by Mr. F. W. Clements, attorney for the appellant.

In the Court of Appeals of the District of Columbia.

No. 3340.

SANTA FE PACIFIC RAILROAD COMPANY, a Corporation, Appellant,

vs.

FRANKLIN K. LANE, Secretary of the Interior.

Opinion.

Mr. Justice ROBB delivered the opinion of the Court:

Appeal from a decree in the Supreme Court of the District dismissing appellant's bill to have the Secretary of the Interior enjoined from canceling a selection made by appellant under the Act of April 28, 1904, (33 Stat. 556), in exchange for lands relinquished.

A grant was made by the Act of July 27, 1866, (14 Stat. 292), in aid of the construction of the Atlantic and Pacific Railroad, and in that Act it was provided that the word "mineral", as used therein, should not be held to include iron or coal. Appellant is the successor in interest to all the rights of the Atlantic and Pacific Company. (See Act of March 3, 1897, 29 Stat. 622.) The Act of April 28, 1904, in part provided:

"That the Atlantic and Pacific Railroad Company, its successors in interest and its or their assigns, may, when requested by the Sec-

retary of the Interior so to do, relinquish or deed, as may be proper, to the United States any section or sections of its or their lands in the Territory of New Mexico, the title to which was derived by said railroad company through the Act of Congress of July twenty-seventh, eighteen hundred and sixty-six, in aid of the construction of said railroad, any portion of which section is and has been occupied by any settler or settlers as a home or homestead by themselves or their predecessors in interest for a period of not less than twenty-five years next before the passage of this Act, and shall then be entitled to select in lieu thereof, and to have patented other sections of vacant public land of equal quality in said Territory, as may be agreed upon with the Secretary of the Interior."

At the request of the Secretary of the Interior appellant relinquished its title to certain lands in the then Territory of New Mexico earned under the grant of 1866, and those lands have been patented to claimants entitled under the provisions of the Act of 1904. On May 1, 1911, subsequent to the relinquishment of its base lands, appellant selected an equal amount of land in the Territory of New Mexico. The lands relinquished and the lands selected had been classified by the Department as coal lands, and the minimum price fixed at $20.00 per acre. On May 2, 1912, an inspector of the Department filed a report to the effect that the coal contents of the selected lands were of greater value than those of the relinquished or base lands. Thereupon, on May 12, 1913, the Commissioner of the General Land Office rejected the selection, but on April 30, 1914, an Assistant Secretary of the Interior reversed this ruling. Within thirty days thereafter, and before the decision of the Assistant Secretary became final, that decision was recalled and held for further consideration. Upon further consideration the Department, on October 26, 1916, found in effect that the base lands were worth $20.00 per acre and the selected lands from $62.00 to $83.00 per acre. Accordingly, the Department declined to approve the selection and vacated the former decision. On the same day, appellant filed an elaborate motion for a rehearing, and this motion was the subject of an additional opinion by an Assistant Secretary, under date of February 13, 1917, denying the motion.

Counsel for appellee have invited our attention to a Departmental decision of March 18, 1919, (of which we may take judicial notice—Knight vs. Land Assoc., 142 U. S. 161; United States vs. Brewer-Elliott Oil & Gas Co., 249 Fed. 619), from which it appears that even after suit had been filed appellant sought and obtained a further hearing in the Department, and that the case received further consideration on the question of fact. In the Departmental decision it was found: "The additional evidence and showings made in support of the petition were submitted to the Director of the Geological Survey, who made report February 1, 1919, from which it appeared that the previous classification and values fixed by him were correct, and the additional showings made rather tended to show that the values theretofore placed upon a portion of the selected lands were too low."

The real question for determination is whether, under the Act of 1904, the Secretary of the Interior, in determining whether base

lands and selected lands are "of equal quality," may take into consideration the element of value. Appellant contends that the selected lands, having been given the same classification as the base lands, were of equal quality, within the meaning of the Act. The Act expressly provides that the selection made thereunder shall be subject to the approval of the Secretary, and, unless it may be said that the withholding of his approval is so unreasonable as to amount to arbitrary action, it is beyond our control. "So, at the outset we are confronted with the question, not whether the decision of the Secretary was right or wrong, but whether a decision of that officer, made in the discharge of a duty imposed by law and involving the exercise of judgment and discretion, may be reviewed * * *." Ness vs. Fisher, 223 U. S. 683. In Riverside Oil Co. vs. Hitchcock, 190 U. S. 316, 324, the court, in speaking of the action of the Secretary, said: "Whether he decided right or wrong, is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction." We think those decisions, in each of which it of course was recognized that arbitrary or merely ministerial acts may be controlled, are binding in this case. The Secretary, in the discharge of his duty, was required to interpret the Act, and we are unable to say that there is no real foundation for the conclusion reached. Quality being a relative term, it would be going far to rule that the Act did not authorize the Secretary to consider at all the question of value. Had the Act stopped with the words "and to have patented other sections of vacant public land of equal quality in said Territory," there would have been more room for appellant's contention. The additional words "as may be agreed upon with the Secretary of the Interior," lend themselves to the view that Congress intended to authorize the Secretary to pass upon the question of the relative values of the relinquished and selected lands. Had the value of the base or relinquished lands in this case been $50.00 per acre, and the value of the lands tendered by the Secretary been of the value of only $20.00 per acre, could it have been contended that the railroad company was under obligation to accept the exchange because both tracts were classified as coal lands? We think not. The provision was for the mutual protection of the parties, and we are of the view that the conclusion reached by the Secretary was not arbitrary or capricious.

As to the contention of the appellant "that the determination (by the Secretary) must be with regard to the condition known to exist, and as evidenced by the records at the time the selection in exchange is filed," little need be said. In Cameron vs. United States, decided by the Supreme Court of the United States on April 19, 1920, the court ruled that "a mining location which has not gone to patent is of no higher quality and no more immune from attack and investigation than are unpatented claims under the homestead and kindred laws." In other words, until final action by the Secretary, the selection in the present case was open to investigation by the Department. The coal deposits in the lands covered by that selection were in the same condition when investigated as when the selection was made,

and it was open to the Department, before final action, to determine the extent and value of those deposits. Washburn vs. Lane, 258 Fed. 524.

The decree is affirmed, with costs.

Affirmed.

Wednesday, June 2nd, A. D. 1920.

No. 3340. April Term, 1920.

SANTA FE PACIFIC RAILROAD COMPANY, a Corporation, Appellant,

vs.

JOHN BARTON PAYNE, Secretary of the Interior.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, It is now here ordered, adjudged, and decreed by this Court that the decree of the said Supreme Court in this cause be and the same is hereby affirmed with costs.

Per Mr. JUSTICE ROBB,
June 2, 1920.

In the Court of Appeals of the District of Columbia.

January Term, 1920.

No. 3340.

SANTA FE PACIFIC RAILROAD COMPANY, a Corporation, Appellant,

vs.

JOHN BARTON PAYNE, Secretary of the Interior, Appellee.

Motion for Allowance of Appeal to the Supreme Court of the United States and to Stay Mandate.

Comes now the appellant, by its attorneys, and moves the Court to allow an appeal to the Supreme Court of the United States to review the decision of this Court herein, and to stay mandate; and for cause shows:

I.

That appeal lies under paragraph 5 of section 250 of the Judicial Code, in that the scope of the power of the Secretary of the Interior over the selection in question, as well as the duty of that officer with respect to such selection, is directly drawn in question in these proceedings.

II.

That appeal lies under paragraph 6 of Section 250 of the Judicial Code for that the construction of the Act of April 28, 1904 (33 Stats., 556), is drawn in question by the defendant who asserts and relies upon said Act as authority for denial of approval to the selection of the land involved, asserting that "under the terms of the Act only such lands as may be agreed upon with the Secretary as being equal in quality with the base lands may be selected."

ALEX. BRITTON,
F. W. CLEMENTS,
Attorneys for Appellant.

Endorsed: No. 3340. Santa Fe Pacific R. R. Co., a Corporation, Appellant, vs. John Barton Payne, Secretary of the Interior. Motion for allowance of appeal to the Supreme Court of the United States. Court of Appeals, District of Columbia. Filed June 18, 1920. Henry W. Hodges, Clerk.

In the Court of Appeals of the District of Columbia, January Term, 1920.

No. 3340.

SANTA FE PACIFIC RAILROAD COMPANY, a Corporation, Appellant,

vs.

JOHN BARTON PAYNE, Secretary of the Interior, Appellee.

On Appeal to the Supreme Court of the United States.

Assignment of Errors.

The appellant hereby assigns the following errors in the decision of the Court in the above entitled cause:

I.

That the Court erred in failing to find and hold that, as under the granting Act of July 27, 1866 (14 Stats., 292), it was specifically provided that the word "mineral" should not include coal or iron, the coal contents of the land was immaterial when determining the "quality" of lands selected by the Santa Fe Pacific Railroad Company, as successor to the Atlantic and Pacific Railroad Company, in exchange for lands surrendered under the Act of April 28, 1904 (29 Stats., 662), and as the decision of the Secretary of the Interior denying approval of such selection was based solely upon the supposed variance in value of the coal deposits in the selected and surrendered lands, the said decision was unwarranted under the law and was, therefore, arbitrary and unreasonable.

II.

That the Court erred in failing to find and hold that, even if the coal contents of the lands selected in exchange was an element to be considered in determining its "quality" under the Act of April 28, 1904, supra, that as the selected and surrendered lands were admittedly valuable for the coal contents, they were, therefore, both of the same "quality," namely, coal lands, and that the value of the coal contents was immaterial, and as the decision of the Secretary of the Interior denying approval of such selections was based solely upon supposed variance in value of the coal deposits in the selected and surrendered lands, the said decision was unwarranted under the law, and was, therefore, arbitrary and unreasonable.

III.

That the Court erred in failing to find and hold that, as the coal land law, providing for the disposition of coal lands on the public domain, fixes their value for disposing purposes with respect to the distance of the lands from a line of constructed road, and at the rate of $10.00 and $20.00 per acre when within or beyond fifteen miles from a constructed road, that even if the presence of coal within the lands selected in exchange under the Act of April 28, 1904, was material in determining their "quality" for the purpose of exchange under that act, said provision of the coal land law fixed their value, and as the value of the selected and surrendered lands was the same when so reckoned under the provisions of the coal land law, the decision of the Secretary denying approval of such selections being based solely upon the supposed variance in value of the coal deposits in the selected and surrendered lands, the said decision was unwarranted under the law, and was, therefore, arbitrary and unreasonable.

IV.

That the Court erred in failing to find and hold that, even if a classification of coal lands, with respect to the coal contents was authorized under the law, as the uniform administration of the law from the time of its passage until long after the passage of the act of April 28, 1904, supra, under which exchange was sought, respected value of coal lands for disposing purposes, only as and in accordance with their distance from a line of constructed road, as provided for in the coal land law, the Act of April 28, 1904, was passed with a knowledge of this uniform administration of the coal land law, and was intended to and did control in determining values of coal lands surrendered and selected under the Act of April 28, 1904, and as the decision of the Secretary of the Interior denying approval of such selections was based solely upon the supposed variance in value of the coal deposits in the selected and surrendered lands, said decision was unwarranted under the law, and was, therefore, arbitrary and unreasonable.

V.

That the Court erred in failing to find and hold that, even if a classification of the lands with regard to coal contents was permissible with respect to fixing "quality" for the purpose of exchanges under the Act of April 28, 1904, as the lands surrendered, as well as those selected in exchange, had been, prior to the selection here in question, classified as of one and the same value, namely, $20.00 per acre, they were of the same "quality," and as the decision of the Secretary denying approval of such selections was based solely upon the supposed variance in value of the coal deposits in the selected and surrendered lands, said decision was unwarranted under the law, and was, therefore, arbitrary and unreasonable.

VI.

That the Court erred in failing to find and hold that even if the coal contents in the surrendered and selected lands were to be considered when determining their "quality" for the purpose of exchange under the Act of April 28, 1904, as the selection in exchange was made in good faith and upon the basis of the classification existing at the time same was filed; that its validity could not be affected by a subsequent classification of the lands, especially where the lands had been the subject of transfer and sale, and innocent persons had expended large sums in the purchase and exploration of the lands long prior to such reclassification, and as the decision of the Secretary denying approval of such selections was based solely upon the supposed variance in value of the coal deposits in the selected and surrendered lands upon the reclassification long after selection, said decision was unwarranted under the law, and was, therefore, arbitrary and unreasonable.

VII.

That the Court erred in failing to find and hold that, as the Santa Fe Pacific Railroad Company upon an invitation of the Secretary of the Interior had surrendered lands under the Act of April 28, 1904, which have been disposed of by the United States, and could not, therefore, be returned to the company, to refuse to approve a selection made in exchange admittedly of lands subject to exchange under the known condition at the time the selection was filed, merely because of a condition created by the act of the Secretary in a subsequent reclassification of the coal deposits in the lands, was an unwarranted act amounting to practical confiscation of the surrendered property, and was, therefore, unreasonable and arbitrary.

VIII.

That the Court erred in holding in effect that, merely because the Act of April 28, 1904, in providing for exchange "as may be agreed upon with the Secretary of the Interior" vested in that officer the

power to pass upon the relative value of the coal deposits in the surrendered and selected lands, and in exercise of his discretion to grant or refuse approval without respect to the known condition of values in the lands at the time of the surrender and the selection of lands in exchange.

IX.

That the Court erred in not finding that the assumed power to accept or reject a selection in exchange under the Act of April 28, 1904, without respect to conditions at date of filing the *selected* in exchange was an unreasonable construction of that act, and, therefore, in effect the exercise of arbitrary power.

X.

That the Court erred in holding that the Act of April 28, 1904, in providing for exchange "as may be agreed upon with the Secretary of the Interior" gave the Secretary either the power or authority, after agreeing to accept certain base lands from the company, and actually accepting the same, to impose conditions in respect to the selected lands not justified by the Acts itself nor *make* a condition of his acceptance.

XI.

That the Court erred in affirming the decree of the Supreme Court of the District dismissing plaintiff's bill and discharging the rule issued thereon.

XII.

That the Court erred in failing to grant the plaintiff relief as prayed for in his bill filed in this cause, as against the unwarranted and unreasonable act of the defendant in withholding approval of plaintiff's selection made as therein complained of.

ALEX. BRITTON,
F. W. CLEMENTS,
Attorneys for Plaintiff.

June, 1920.

Endorsed: No. 3340. Santa Fe Pacific Railroad Company, a Corporation, Appellant, vs. John Barton Payne, Secretary of the Interior. Assignment of Errors. Court of Appeals, District of Columbia. Filed June 18, 1920. Henry W. Hodges, Clerk.

Wednesday, June 23rd, A. D. 1920.

No. 3340.

SANTA FE PACIFIC RAILROAD COMPANY, a Corporation, Appellant,
vs.
JOHN BARTON PAYNE, Secretary of the Interior.

On consideration of the motion for the allowance of an appeal to the Supreme Court of the United States in the above entitled cause,

It is by the Court this day ordered that said appeal be and the same is hereby allowed and the bond to act as supersedeas is fixed at the sum of three hundred dollars.

(*Bond on Appeal.*)

Know all Men by these Presents, That we, Santa Fe Pacific Railroad Company, a corporation, as principal, and The Fidelity & Casualty Company of New York, as surety, are held and firmly bound unto John Barton Payne, Secretary of the Interior, in the full and just sum of Three hundred dollars *dollars,* to be paid to the said John Barton Payne, Secretary of the Interior, certain attorney, executors, administrators, successors or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this thirtieth day of June, in the year of our Lord one thousand nine hundred and twenty.

Whereas, lately at a Court of Appeals of the District of Columbia in a suit depending in said Court, between Santa Fe Pacific Railroad Company, a corporation, and John Barton Payne, Secretary of the Interior, a decree was rendered against the said Santa Fe Pacific Railroad Company, a corporation, and the said Santa Fe Pacific Railroad Company, a corporation, having prayed and obtained an appeal to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said John Barton Payne, Secretary of the Interior, citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof;

Now, the condition of the above obligation is such, That if the said Santa Fe Pacific Railroad Company, a corporation, shall prosecute said appeal to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

SANTA FE PACIFIC R. R. CO.,
By F. W. CLEMENTS, *Att'y.* [SEAL.]
THE FIDELITY AND CASUALTY COMPANY OF NEW YORK,
By EDGAR K. LEGG, JR., *Attorney.*

[Seal of the Fidelity and Casualty Company of New York.]

#783,369.

Sealed and delivered in presence of—
CHESTER R. SMITH.
HENRY C. DAVIS.

Approved by—
C. J. SMYTH,
Chief Justice Court of Appeals of the District of Columbia.

[Endorsed:] No. 3340. Santa Fe Pacific R. R. Co., Appellant, vs. John Barton Payne, Secretary of the Interior. Bond on appeal to

Supreme Court, U. S. Court of Appeals, District of Columbia. Filed Jun- 30, 1920. Henry W. Hodges, Clerk.

UNITED STATES OF AMERICA, *ss:*

To John Barton Payne, Secretary of the Interior, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Santa Fe Pacific Railroad Co., a corporation, is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the appellant should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Constantine J. Smyth, Chief Justice of the Court of Appeals of the District of Columbia, this 30th day of June, in the year of our Lord one thousand nine hundred and twenty.

CONSTANTINE J. SMYTH,
Chief Justice of the Court of Appeals of the District of Columbia.

Service acknowledged:
C. EDW. WRIGLER,
Attorney for Appellee.

Court of Appeals of the District of Columbia.

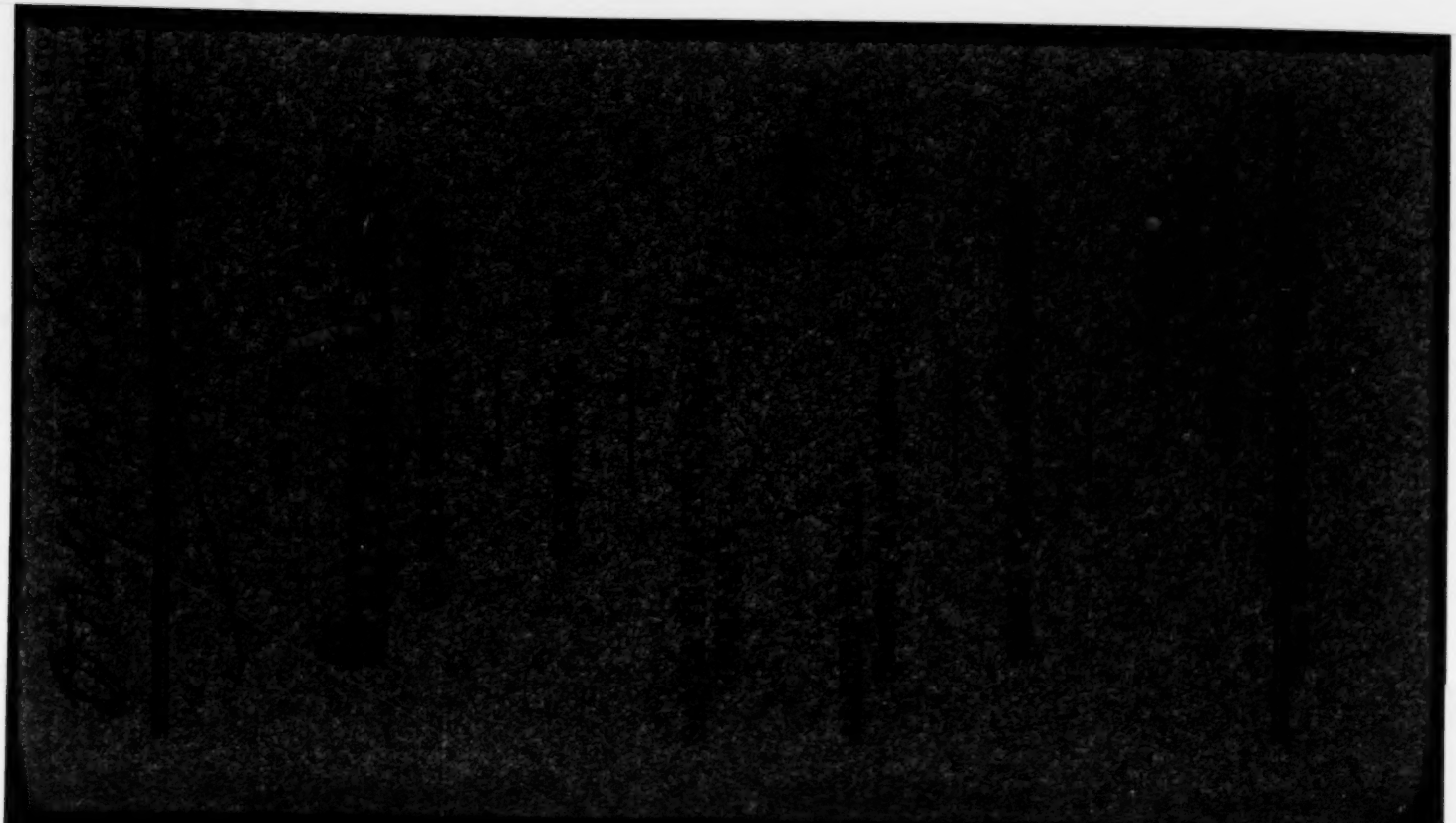
I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 47, inclusive, constitute a true copy of the transcript of the record and proceedings of said Court of Appeals in the case of Santa Fe Pacific Railroad Co., a Corporation, Appellant, vs. John Barton Payne, Secretary of the Interior, No. 3340, April Term, 1920, as the same remains upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washinton, this 1st day of July, A. D. 1920.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 27,808. District of Columbia Court of Appeals. Term No. 451. Santa Fe Pacific Railroad Company, appellant, vs. John Barton Payne, Secretary of the Interior. Filed July 15th, 1920. File No. 27,808.



GENERAL INDEX

TOPIC INDEX

IN THE

Supreme Court

OF THE UNITED STATES

OCTOBER TERM, 1921

SANTA FE PACIFIC RAILROAD COMPANY

v.

ALBERT B. FALL,
Secretary of the Interior.

No. 108

BRIEF FOR PLAINTIFF IN ERROR

This case comes before the Court upon appeal from the decision of the Court of Appeals of the District of Columbia, affirming the decree of the Supreme Court of the District of Columbia, dismissing appellant's bill to enjoin the Secretary of

the Interior from the cancellation of a selection made in furtherance of an exchange as provided for in the act of April 28, 1904, (33 Stat. 556).

STATEMENT

By the Act of July 27, 1866, 14 Stat. 292, a grant was made in aid of the construction of the Atlantic & Pacific Railroad, by which act it was specifically provided that the "word 'mineral' when it occurs in this act, shall not be held to include iron and coal." The portion of said grant, opposite which lies the lands made the base for the selection here in question, was duly earned by the construction of the road and the Sante Fe Pacific Railroad Company, appellant herein, under foreclosure sale, became possessed of all the rights of the Atlantic & Pacific Railroad Company, Act of March 3, 1897, (29 Stat. 622). After rights had attached under the grant of July 27, 1866, certain individual members of Indian tribes settled upon odd-numbered sections within the primary limits of said grant, the settlements being generally around water holes, and as the occupations had been continued for many years, to relieve the situation, the Act of April 28, 1904, supra, was passed. By the first section of that act it was provided:

> "That the Atlantic and Pacific Railroad Company, its successors in interest and its or their assigns, may, when requested by the Secretary of the Interior so to do, relinquish or deed, as may be proper, to the

> United States any section or sections of its or their lands in the Territory of New Mexico the title to which was derived by said railroad company through the act of Congress of July twenty-seventh, eighteen hundred and sixty-six, in aid of the construction of said railroad, any portion of which section is and has been occupied by any settler or settlers as a home or homestead by themselves or their predecessors in interest for a period of not less than twenty-five years next before the passage of this act, and shall then be entitled to select in lieu thereof and to have patented other sections of vacant public land of equal quality in said Territory, as may be agreed upon with the Secretary of the Interior."

Following the passage of this act, a circular letter of instructions was addressed the Register and Receiver at Santa Fe, New Mexico, under date of August 2, 1904, (33 L. D. 156), and therein in defining the purpose of the act it was said:

> "The purpose of this act is to enable certain claimants to land, known as 'small-holding claimants,' who were authorized to receive patents for such lands, not to exceed 160 acres, upon specified conditions, by sections 16 and 17 of the act of March 3, 1891 (26 Stat., 854), as amended by the act of February 21, 1893 (27 Stat., 470), to complete title to their entire claims, the odd-numbered sections in a number of cases having passed under the grant by Congress to the Atlantic and Pacific Railroad Com-

pany; but it will be observed that the benefits intended to be conferred are restricted to the odd-numbered sections within the limits of said railroad grant in the Territory of New Mexico, and that the act is not mandatory, but simply provides a means for the relief of said claimants depending upon the voluntary relinquishment by the railroad company, or its successors in interest and its or their assigns, upon request by the Secretary of the Interior, of the lands claimed."

After investigation had, the tracts occupied by the individual claimants within the primary or place grant were identified and the Santa Fe Pacific Railroad Company, as successor in interest of the Atlantic & Pacific Railroad Company, was called upon to surrender or relinquish its title to said lands in favor of the small-holding claimants, which request was fully complied with, the company relinquishing all tracts desired; whereupon the tracts so relinquished were patented to the individual claimants, and so much of the exchange provided for in the act of 1904 has been fully carried into effect.

Shortly after the relinquishment and surrender of the lands by the Santa Fe Pacific Railroad Company, a question arose as to whether the small holding claimants, being mere settlers upon the lands, could enter and acquire title to the lands so surrendered or relinquished where the same were found to contain valuable deposits of coal, and

this matter was considered by the department, and in disposing of the same it was said:

> "It will be seen by referring to the act of 1904, quoted above, that no mention is made of mineral lands nor are the settlers confined in terms to non-mineral lands. The act clearly authorizes the Atlantic and Pacific Railroad Company, or its successors in interest, to relinquish any land acquired under its grant, upon which the Secretary of the Interior is authorized to issue a patent to such settler for the land held by him, there being but one proviso, namely, that not to exceed one hundred and sixty acres shall be patented to any one person, who must possess the qualifications necessary to entitle him to enter such land under the homestead laws.
>
> "By the terms of the treaty of Guadalupe Hidalgo, concluded February 2, 1848 (9 Stat., 922), the United States agreed to protect the titles of individuals derived from former sovereigns owning the territory, and provision was made for confirmation of such claims by the act of July 22, 1854 (10 Stat., 308). A number of claims filed with the surveyor-general as provided for by the act of 1854, some embracing very large areas and others consisting only of small claims, were confirmed by Congress from time to time until March 3, 1891, when Congress, by act of that date, created a Court of Private Land Claims for the adjudication of all such claims in the territory acquired from Mexico.

"By the sixteenth and seventeenth sections of the act of 1891, Congress afforded the holders of small tracts, not exceeding 160 acres, and who had occupied the same for the period specified in the act, an inexpensive and easy method of acquiring title thereto without the necessity of resorting to the Court of Private Land Claims for confirmation. These claimants had merely to file their claims with the surveyor-general of the Territory and to make proof of their citizenship, by virtue of the treaty with Mexico, and their occupation of the land for the period named in the act. The act contained no provision whatever restricting such claims to non-mineral lands, whereas in that portion of the act relating to claims submitted for confirmation by the court, it was provided that no allowance or confirmation of any claim should confer any right or title to any gold, silver or quicksilver mines or minerals of the same, unless the grant claimed effected the donation or sale of such mines or minerals, or unless the grantee had otherwise become entitled thereto in law and in equity.

"While it is true that no express exception of mineral lands is necessary to exclude them from an ordinary grant, nevertheless, where Congress undertakes to except certain minerals, the presumption is that all minerals not named are not excepted, and it is but reasonable to assume that Congress intended to impose no greater restrictions upon the small-holding claimant provided for by sections sixteen and seventeen of the act than were imposed upon the owners of

larger claims who were required to procure confirmation through the court.

"Having under consideration the purpose of sections sixteen and seventeen of the act of 1891, this Department has said:

'The history of the act of 1891 and the terms of the act itself, which was the successful culmination of frequent attempts since the act of 1854 at legislation looking to the final settlement of private land claims in the territory derived from the Republic of Mexico, show that the homes and lands of small holding claimants * * * were the objects of the special solicitude of Congress, and that it was the intention by the passage of the latter act to afford full protection, and provide a simple and easy means by which they could secure and perfect their titles against all possibility of successful claim under the public land laws of the United States as well as against danger to them by reason of failure of confirmation of the alleged Spanish or Mexican grants within which their claims were situated. It is believed that the laws and decisions applicable to the facts in this case should be liberally construed and applied in behalf of these small holding claimants. (Apodaca et al v. Mulligan, 27 L. D., 604, 608).'

"As stated in your office letter, Congress knew that the railroad company acquired the title to coal land under its grant, and as the act of 1904 clearly provided that the company may relinquish any section of land acquired under the grant which is occupied by a small holding settler, to the end that

> the home of the latter may be protected, there would seem to be no reason why the land so relinquished by the company may not be patented to the settler if he can show himself qualified under the terms of the act." (39 L. D., 135-138.)

May 1, 1911, following the surrender of the base lands, the Santa Fe Pacific Railroad Company filed in the District Land Office its list selecting the land here in question. The selection in all respects met the law and the lawful requirements of the Land Department, and the same was duly accepted by the local land office, and was in due course forwarded to the Commissioner of the General Land Office. It should be here stated that at and prior to the passage of the act of April 28, 1904, under which this selection was filed, coal lands were disposed of under and in accordance with Sec. 2347 to Sec. 2352 of the Revised Statutes, inclusive, and at the specific prices of $10.00 and $20.00 per acre, governed by distance from a completed railroad as therein specified. At a later period, a practice of appraising or classifying coal lands according to the supposed *value* of the coal contents was instituted by the Land Department and under this practice both the base lands and the selected lands here in question had been, prior to the filing of the selection in question, classified or appraised by the Geological Survey, a bureau of the Interior Department, at the rate of $20.00 per acre (Record, p. 3), and it was under these conditions that the selection of May 1, 1911, was filed.

One year after the selection had been filed, to-wit, May 2, 1912, an inspector of the General Land Office, after a field investigation, reported upon this selection, finding, that the base and selected lands so far as topography is concerned are of equal quality, but, in his opinion, the coal contents of the selected lands are of greater value than that found in the surrendered or base lands, and based alone on this report the Commissioner of the General Land Office, by his decision of May 12, 1913, rejected the selection, but upon appeal the Secretary of the Interior, in his decision of April 30, 1914, held:

> "The value of lands is an element which may be taken into consideration in determining their quality. It appears that both the base and selected tracts have been classified as coal lands at the *minimum price*, which is equivalent to a finding that they are coal lands of equal quality. This classification by the Government should be considered as determinant in the absence of a pertinent and competent showing to the contrary.
>
> "The conditions mentioned in the special agent's report, it must be assumed, were all considered and passed upon by the Geological Survey in making the classification of these lands, and the facts therein set forth do not constitute such a showing as would warrant the Department in rejecting this selection. As the records of the Department show that the lands selected and the base lands are of equal quality, no good

reason appears for rejecting the railroad's selection.

"The decision appealed from is accordingly reversed, and the case remanded with directions to allow the selection to go of record." (pp. 3, 5 and 6 of Record.)

Thus it will be seen that this selection in the light of the full record, including the inspector's report, received the approval of the Secretary of the Interior April 30, 1914, or about three years after the selection had been filed with and accepted by the local land office. Thereafter, the favorable decision upon the selection was recalled and a further field investigation ordered, as a result of which report was made of a higher value in the coal contents of the selected lands from that given to the surrendered or base lands, and based alone upon this supposed inequality in *value* of coal contents, the selection was rejected. In the course of the opinion rejecting the selection, it was said:

> "Under the terms of the act only such lands as may be agreed upon with the Secretary of the Interior as being equal in quality with the base lands may be selected. It being satisfactorily shown that the selected lands are superior in quality to the base lands, the Department is unable to approve the selection, and it is hereby rejected. (pp. 3, 7 and 8 of Record.)"

It was following this rejection of the selection that this action was instituted to restrain the secre-

tary from carrying his decision into effect and cancelling the selection in exchange. It should be said that third parties, following the filing and acceptance of the selection here in question, made purchase of these lands, and when the matter was pending before the Land Department, it was specially urged that these intervening rights were entitled to equitable consideration, their investments having been made in the light of and with a knowledge of the conditions existing at the time the selections were filed (pp. 8 and 16 of Record), but the decision ordering rejection of the selection was adhered to (R. p. 19). It was because of the large expenditures made by the purchasers that a further effort was made, even after this action was begun, to convince the department as a matter of fact that the coal contents within the surrendered lands were of as great or greater value than those in the selected lands, and to that end extensive borings were made upon the property, costing many thousands of dollars, and proof offered the department in demonstration of the facts, but the department adhered to its previous adjudication of greater value in the coal contents within the selected land.

The Court below took judicial cognizance of this later proceeding in the Land Department, and it is for that reason that the above statement is made with reference thereto. It is the claim of appellants:

I.

That the Act of April 28, 1904, supra, is to be construed as in pari materia with the granting act of July 27, 1866, supra, and that when so considered, the coal contents are not material in determining the quality of the selection for approval.

It should be understood that it is only because of supposed greater value of the coal deposits in the selected land, when contrasted with like deposits in the base or surrendered lands, that approval of the selection, here in question, is withheld.

It is the claim of appellants that as the granting act of 1866 specifically provided that the word "Mineral" should not include *coal* or iron, it was the plain purpose to grant lands thereunder irrespective of the coal or iron deposits therein, and that the act of April 28, 1904, must be construed as in *pari materia* with the granting act of 1866, and when so construed, *coal* or iron deposits in the selected lands should not be reckoned with in determining the "quality" of such lands, for the purpose of exchange under said act.

It will be noted that the act of April 28, 1904, deals *only* with lands granted by the act of July 27, 1866. Under that grant had the small holding claimants been held to have rights superior to the grant, lieu or indemnity lands might have been selected thereunder without regard to whether the

selected lands contained coal or iron deposits, and irrespective of the value of such deposits.

The settlement claims, the subject of the act of 1904, being inferior to the grant, it was necessary to secure release under the grant in order to protect the settlements made on granted lands, and this was the real purpose of the act of April 28, 1904.

In protection of settlement rights made upon the released lands, the Land Department has held, as hereinbefore stated, that Congress, when passing the act of 1904, knew that the railroad company acquired title to coal lands under its grant of 1866, and for that reason might surrender coal lands, therefore it was held that the settler might acquire title to the lands released on which he had settled irrespective of coal or iron deposits. This is clear recognition of the principle for which we contend, viz, that the two acts are to be construed as in *pari materia*. Is it not unreasonable, then, to hold that it was the purpose of Congress, when extending protection to mere settlement claims, always by prior legislation limited to non-mineral lands, to pass the mineral deposit to the settler upon release by the railroad company because, under the railroad grant, coal was not to be reckoned with as a mineral, and yet at the same time to hold that the company, entitled under the grant of 1866, to take coal lands both in place and as indemnity, as a result of its release under the Act of 1904, to protect settlement claims, thereby lost the benefit of the

original grant to select lieu lands irrespective of coal or iron deposits found therein?

It will be noted that on filing release to protect settlement, the company became entitled under the Act of 1904 to select "other sections of vacant public land of equal quality in said territory." That act does not in terms limit the selected lands to the *same area* as that released or surrendered. As the act deals, however, only with lands granted by the Act of 1866, it was undoubtedly the purpose to grant indemnity or lieu lands as provided for in the Act of 1866, that is, of like amount with the surrendered lands and of the same *quality* as lands granted by the act of 1866, but not to restrict the selection to the sections designated by odd-numbers nor to specific indemnity limits as provided for in the Act of 1866. In other words the plain purpose of the act was, upon release of the lands needed in the protection of the settler, to grant to the Company a like amount of indemnity as provided for in the granting act of 1866, but not to restrict the selection to odd-numbered sections, nor to the indemnity limits as defined in that act.

The Court below failed to give specific notice to this contention in its decision,—a contention which in our opinion is determinative of this case,—for if lands may be selected in lieu of those released under the act of April 28, 1904, irrespective of their coal contents, then the decision of the Secretary of the Interior denying approval of the selection in question solely because of supposed greater *value* of coal deposits in the selected lands when

contrasted with like deposits within the lieu or surrendered lands, was without the law, unwarranted, arbitrary, and should be controlled by the decision of this court.

The administration of this grant by the Land Department has been in line with this contention.

Following the passage of the act of 1904, an investigation was first instituted by the Land Department to determine the particular lands occupied and subject to relinquishment under that Act. A list of the several claims was then prepared and formal call made upon the Santa Fe Pacific Railroad Company as successor to the Atlantic & Pacific Railroad Company for re-conveyance of the lands. Relinquishment was filed as requested, and the relinquishment was duly accepted by the Department and the company advised that it might take indemnity in amount equal to the lands relinquished as provided for in the Act of 1904. Lists were presented in selection of indemnity, and when patents were issued thereon, the patents recited the grant of 1866, the completion of the road under that act, thereby earning the title, the successorship of the Santa Fe Pacific Railroad Company, relinquishment under the Act of 1904, and selection of the lands in lieu. In 1911, when suit was instituted against the Southern Pacific Railroad Company to recover title to mineral lands patented to that company, the department determined to include a mineral exclusion clause in patents issued under the several transcontinental railroad land grants. In this

connection, it was proposed to insert such a clause in patents issuing to the Santa Fe Pacific Railroad Company, under the Act of 1904. The company objected, but over its objection the Department, by decision of May 4, 1912, directed that patents issued upon selections under the Act of 1904 should contain a mineral reservation where the base land had not been previously patented under the Act of 1866, thus carrying into the Act of 1904, the conditions and limitations in the grant of 1866.

We are printing as an appendix to this brief, the several orders of the department herein referred to, evidencing the administration of this grant.

II.

The Act of 1904 evidences no purpose to change the provision found in the Act of 1866 respecting mineral lands.

There is no specific exception of mineral lands in the Act of 1904, and had it been the purpose of the Congress to change the mineral provision found in the Act of 1866, it would have done so in clear and unmistakable terms. In this connection, we invite attention to the Northern Pacific granting Acting of July 2, 1864, 13 Stat., 365. By Sec. 3 of that Act all mineral lands were excluded from the grant, but as in the case of the Act of July 27, 1866, supra, it was provided that the word "mineral" shall not include coal or iron, and with regard to

indemnity for the excepted mineral lands it was specifically provided:

> "And in lieu thereof a like quantity of unoccupied and unappropriated *agricultural* lands, in odd-numbered sections, nearest to the line of said road may be selected as above provided."

Again, where settlements had been made by individuals upon lands granted the Northern Pacific Railroad, the Act of July 1, 1898, 30 Stat., 597-620, provided for adjustment of such conflicts through relinquishment by the company and the selection of other lands in lieu thereof, and in that act it was specifically provided that the company "shall be entitled to select in lieu of the lands relinquished an equal quantity of public lands, surveyed or unsurveyed, not mineral or reserved, and not valuable for stone, iron or coal, and free from valid, adverse claim, etc."

Again, by the Act of March 2, 1899, 30 Stat., 993, certain lands were set apart in the State of Washington and Mt. Rainier National Park, which included lands within the primary limits of the Northern Pacific land grant. That act provided for relinquishment of such lands, whereupon the company was to be "authorized to select an equal quantity of non-mineral public lands, so classified as non-mineral at the time of actual government survey, etc."

Particular attention is invited to the act of April 21, 1904, 33 Stat., 189-211. That act was

passed just seven days before the act here under consideration, and the two acts were at the same time necessarily under consideration by the same committees of Congress. The Act of April 21, 1904, was an act making appropriation for current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, etc. It was provided by that act:

> "That any private land over which Indian reservation has been extended by executive order may be exchanged at the discretion of the Secretary of the Interior and at the expense of the owner thereof, and under such rules and regulations as may be prescribed by the Secretary of the Interior, for vacant, non-mineral, non-timbered, surveyed public lands of equal area and value and situated in the same state or territory."

With these limitations in the mind of Congress, at the passage of this act, only seven days before the passage of the one under consideration, it must be presumed that Congress in passing the act of April 28, 1904, dealt with the situation in the full knowledge of the conditions found in the Act of July 27, 1866, and intended to limit the lands selected in exchange for those to be relinquished under the Act of April 28, 1904, to lands of equal or like quality with those granted and subject to selection as indemnity under the Act of July 27, 1866. *This but places the company in the same*

situation in regard to the lieu to be taken under the Act of 1904, *so far as concerns the character of the lands, as though the surrendered lands had been lost to the grant in the first instance.*

III.

At most the Act of 1904 merely required the selected lands to be of the same general kind as the surrendered lands, which was the case with respect to the selection in question.

Let us assume, however, that this requirement in the Act of 1904, that the lands selected should be of "equal quality" had relation, alone, to the particular lands surrendered, and that thereby it was meant to match each particular sub-division selected with the sub-division released irrespective of the mineral provision found in the Act of 1866. It could have required nothing more than that the particular land selected should be of the same sort or character as the particular tract surrendered and made the base for such selection. Webster defines quality as "the condition of being of such a sort as distinguished from others." Thus it is laid down that in an action brought for recovery of real property its *quality* should be shown, as to whether it consists of houses, lands or other hereditaments; and in general it should be stated whether the lands be meadow, pasture or arable, etc. (Words and Phrases judicially defined Vol. 7, p. 5879.)

In disposing of lands Congress has, through its legislation in this regard, classified the lands as agricultural, desert, and mineral, and has specially provided for disposal of coal lands and lands valuable for timber or stone. Even under such a restricted construction of the language of this act of 1904, the selection in question meets the requirements of the act, for there is no dispute but that the surrendered lands contain valuable deposits of coal—in other words the surrendered and selected lands are both coal lands. The only question in this regard that could possibly be raised would be with respect to the respective *values* of the coal deposits found in the surrendered and selected lands. In this connection, the Land Department has undertaken to inquire with regard to the *value* of these coal deposits in the two tracts, and, as before stated, it is based alone upon the conclusion reached with respect to the *value* of these deposits that approval of the selection is denied.

We think we are correct in saying that nothing is more of a gamble than a guess as to the value of undisclosed minerals in a piece of land, and that values can only be known on actual development. We also say that we know of no legislation by Congress requiring a determination of the undisclosed mineral value of public lands precedent to or as fixing its character for disposition, surely not prior to the passage of the Act of April 28, 1904, under which the present exchange was made. The present case is illustrative of the difficulties

attendant upon any such investigation as to value of undisclosed mineral. This land was first classified by the Geological Survey, a branch of the Interior Department, the base as well as the selected land being fixed as of a value of $20.00 per acre. *Three separate classifications have since occurred, and in each the values have changed.* We feel sure, then, had it been the purpose of Congress to have disregarded the long-continued practice respecting the prices named of $10 and $20 per acre in disposal of coal lands governed by distance from a completed railroad substituting judgment as to *value* of coal deposits for basis of exchange under the Act of 1904, a definite method for ascertaining the coal values would have been prescribed, or at least its purpose in this regard would have been made clear.

In concluding this branch of the case, we call attention to the fact that under the laws with regard to disposition of public lands containing mineral, the baser metals are disposed of at the same rate as the more precious, viz, $2.50 per acre where found in placer formation, and $5.00 per acre where it occurs in lode formation, clearly evidencing no intention to exact the real value of the mineral deposit. Further, the prices of $10 and $20 per acre for coal lands are twice and four times the values named for lands containing the most precious minerals.

IV.

The Act of 1904 conferred no arbitrary power upon the Secretary of the Interior with regard to the selected lands.

The real difficulty in this case, both before the courts below and the Land Department, was occasioned by the effect given to the concluding clause of Section 1 of the Act of February 28, 1904, which reads:

> "As may be agreed upon with the Secretary of the Interior."

This clause has been construed as practically investing the Secretary of the Interior with arbitrary power over selections filed in exchange under said Act, which continues until the patent is actually issued. As held by the Secretary in his decision of October 26, 1916, recalling his prior approval given to the selection (Record, pp. 7 and 8) "under the terms of the Act only such lands as may be agreed upon with the Secretary as being in quality with the base lands may be selected.

Section 1 of the Act of 1904, provides that the Atlantic & Pacific Railroad Company, its successors or assigns, may relinquish any section or sections granted it by the Act of 1866, within the territory of New Mexico, on which certain character of settlement claims had been maintained, with the right to select other sections of equal

quality within said territory "as may be agreed upon with the Secretary of the Interior."

When this bill was before Congress, there was no discussion preceding its passage in the Senate, and but little preceding its passage by the House, but a reading of the discussion before the House discloses that the only fear was that as the lieu lands to be taken in exchange under the Act of 1904 were not limited to the odd-numbered sections as fixed in the original grant of 1866, the Act of 1904 might have the effect of destroying the checker board system, and permit the acquirement of solid blocks where bunched with the odd sections granted, but the history of the legislation will show that there was never a suggestion with regard to limiting or changing that provision in the original grant of 1866, allowing the company to select lieu lands without respect to coal and iron deposits that might be found therein. The only thought of limitation was that regarding amount that might be exchanged.

Under the Act of 1904, the relinquishment of any or all the lands when requested was entirely at the option of the railroad company; in other words, it was not made obligatory upon the company to relinquish upon the request of the Secretary of the Interior. Again, the company might relinquish the whole of any section, any part of which was occupied by a settlement claim, but it was not bound to relinquish the whole of a section (see instructions August 2, 1904, supra) and in these particulars there must be an agreement

reached, first, as to what lands were so occupied as to afford basis for relinquishment; second, as to whether a relinquishment would be made; and third, as to the amount to be relinquished, and in these particulars there must have been an agreement with the Secretary of the Interior, which was reached when that officer approved of the relinquishment as filed by the railroad company. In approving he held, as shown in the appendix, that the company might select an equal amount of indemnity to that relinquished. This clearly entitled the company to select its indemnity in the same manner and of like character to that taken under the granting act of 1866, and unless the adjustment was to continue along these lines, can it be conceived that the department would take the benefit of the company's relinquishment; patent the lands relinquished, and thus put it beyond its power to restore a status quo, knowing that there would undoubtedly be difficulty in arriving at an agreement with the company with respect to the value of undisclosed mineral deposits within the selected or lieu lands? In the decision of the Court below, it is said:

> "Had the value of the base or relinquished lands in this case been $50.00 per acre, and the value of the lands tendered by the Secretary been of the value of only $20.00 per acre, could it have been contended that the railroad company was obliged to accept the exchange because both tracts were classified as coal land?

> We think not. The provision was for the mutual protection of the parties, and we are of the view that the conclusion reached by the Secretary was not arbitrary nor capricious."

With all due respect to the court below, this is surely a misconception of the real situation. As we have shown, the lands to be relinquished were first identified and the company required to *agree* with respect to relinquishment before selections in exchange were permissible, and when the company had relinquished and the relinquishment was accepted, it was then held that the company might select an equal quantity of lands in exchange for those relinquished. The selections in exchange were by the company. The Secretary did not proffer lands to the company in exchange for those relinquished or to be relinquished. If, after the relinquishment by the company and the selection of lands in lieu in all respects subject to the selection under known conditions at that time, the company's rights were dependent upon a later agreement with the Secretary, then we say that it was entirely within the power of the Secretary to withhold such agreement, and in that way force the company to accept such lands as *he* might select for them. There is no mutuality in such a condition, for the company would be at the mercy of the Secretary and must accept, in order to receive approval of the selection, such *value* as his agents

might fix upon the respective lands relinquished and selected.

In framing his question, the learned justice would be nearer the real question had he said:

"Had the known value of the base and selected lands been the same at the time of selection, and thereafter, but before approval, the base lands were shown to be of materially greater value, would the Company have been obliged to complete the exchange?"

And the answer must undoubtedly be "Yes." Why then should not the other contracting party be held to a similar course of action?

In our view of the Act of 1904, it was not purposed to give to the Secretary other or greater power than a judicial discretion to determine whether the selection, when made, was a proper one under the conditions then known.

V.

That the known condition existing at the time the selection in exchange is filed and completed alone determines the validity of such selection, and no change in the condition created by acts of the Land Officials can affect rights under a selection lawful when filed.

It is not our purpose to attack the authority to classify the coal deposits in public lands as fixing their future disposal price, or even to re-classify them for that purpose. As before stated, it is ad-

mitted that the surrendered land, as well as the selected land, contains valuable coal deposits and it cannot be disputed that prior to the passage of the act of April 28, 1904, and indeed, for quite a period thereafter, coal lands were disposed of under the coal land laws at the fixed prices named in the statute, namely, $20 per acre where within fifteen miles of a completed railroad, and $10 per acre where beyond that distance from a completed railroad, and when Congress passed the Act of 1904, it must have taken into consideration this uniform administration of the coal land laws, from the date of their enactment. Conceding then the power to classify according to supposed value of coal deposits for the purpose of disposition, the record shows that both the surrendered and selected lands had been, prior to the filing of the selection here in question, classified as of a value of $20 per acre. The classification of the selected land constituted an offer on the part of the United States to sell the tract at the fixed price, and had the claimants under the selection here in question filed a formal application to purchase this land under the coal land laws while that price was existent, a subsequent classification at a high value could not have affected the coal applicant's rights. (William B. Rosser, 42 L. D., 571.)

In the Rosser case, he applied for the land at the classified price, but before he had completed his proofs and tendered his money, a second classification had occurred which placed a higher value upon

the lands. In disposing of the case, the Department said:

> "Rosser applied for the land while it was classified at $25.00 per acre, and promptly prosecuted his application to entry. He has accepted the offer of the Government and has complied with the conditions of the offer and should, therefore, even conceding the legal power on the part of the United States to demand a higher price, as a matter of fair dealing, be permitted to complete his purchase without additional payment."

It should be remembered that the Act of April 28, 1904, is an exchange act. The lands made the basis for relinquishment under that Act were lands, the title to which had already vested in the railroad company and the United States was desirous of reacquiring the title for the purpose of passing it to certain meritorious settlers. The surrender, therefore, of the base lands was the equivalent of a payment to the United States, and under those conditions it seems clear that the position of the company, under its selection filed and completed five years before a later classification of the lands, entitles the selectors to equally "fair dealing" to that extended in the Rosser case, above referred to.

In this connection, we invite the attention of the Court to the case of the State of Wyoming et al v. The United States, disposed of by this court in its decision of March 28th, last. That case, like

this, involved a selection in exchange of lands. In that case the State's title had vested in certain school sections within the exterior limits of a forest reserve, and by an act of Congress an invitation was extended the State to waive its right to the school section and to select in lieu thereof other lands of equal acreage from unappropriated non-mineral public lands outside the reservation and within the State. The State accepted the invitation through the selection of other lands which at the time of the selection were not known to possess mineral value. Thereafter, and before any approval had been given to the selection by the Secretary of the Interior, the selected lands were shown to contain very valuable deposits of oil. The decision of this court upheld the State selection, notwithstanding this subsequent disclosure of mineral value, and in the course of the opinion it was said:

> "The question presented is whether, considering that the selection was lawfully made in lieu of the state-owned tract contemporaneously relinquished, and that nothing remained to be done by the State to perfect the selection, it was admissible for the Commissioner and the Secretary to disapprove and reject it on the ground that the selected land was withdrawn two years later under the Act of June 25, 1910, and still later was discovered to be mineral land, that is, to be valuable for oil. Or, putting it in another way, the question is whether it was admissible for those officers to test the validity of the selection by the changed

conditions when they came to examine it, instead of by the conditions existing when the State relinquished the tract in the forest reserve and selected the other in its stead.

"In principle it is plain that the validity of the selection should be determined as of the time when it was made, that is, according to the conditions then existing. The proposal for the exchange of land without for land within the reserve came from Congress. Acceptance rested with the State and of course would be influenced and controlled by the conditions existing at the time. It is not as if the selection was merely a proposal by the State which the land officers could accept or reject. They had no such option to exercise, but were charged with the duty of ascertaining whether the State's waiver and selection met the requirements of the Congressional proposal and of giving or withholding their approval accordingly. The power confided to them was not that of granting or denying a privilege to the State, but of determining whether an existing privilege conferred by Congress had been lawfully exercised;—in other words, their action was to be judicial in its nature and directed to an ascertainment and declaration of the effect of the waiver and selection by the State in 1912. If these were valid then—if they met all the requirements of the Congressional proposal, including the directions given by the Secretary—they remained valid notwithstanding the subsequent change in conditions. Acceptance of such a proposal and

> full compliance therewith confer vested rights which all must respect. Equity then regards the State as the owner of the selected tract and the United States as owning the other; and this equitable ownership carries with it whatever of advantage or disadvantage may arise from a subsequent change in conditions whether one tract or the other be affected. Of course the State's right under the selection was precisely the same as if in 1912 it had made a cash entry of the selected land under an applicable statute, for the waiver of its right to the tract in the forest reserve was the equivalent of a cash consideration. And yet it hardly would be suggested that the Commissioner or the Secretary on coming to consider the cash entry could do otherwise than approve it, if at the time it was made the land was open to such an entry and the amount paid was the lawful price."

It is our view that, when upon invitation by the Secretary of the Interior the company filed its relinquishment or surrender of the base lands and the same was accepted by the Secretary of the Interior, agreement was had with the Secretary respecting the exchange and it but remained to make appropriate selection in order to complete the exchange, and the company's right under the selection was precisely the same as if at the date of the filing of its selection it had made a cash purchase of the lands under the coal land laws, for as held by this Court in the Wyoming case, the company's waiver or surrender of its title to the tract made

the base for the selection upon the invitation of the government was the equivalent of a cash consideration, and when so reckoned the known condition at the time of the filing of the completed selection must control in determining its lawfulness. Conceding, then, that the base and selected land must be shown to be of not only equal quality but equal value, and conceding the right of classification of the undisclosed deposits for the purpose of fixing the value, the established and known value announced on classification for the purpose of disposition, fixed the base and selected tract here under consideration as of the same quality and value, and the selection, therefore, when made was a lawful one, and it must follow as a consequence that the reason assigned for later withholding approval from the selection, namely a supposed higher value in the coal deposits fixed by a later classification, cannot affect the validity of the selection, and therefore it follows as a matter of law that the Secretary erred in rejecting the same.

We submit the judgment below should be reversed.

ALEX. BRITTON,
F. W. CLEMENTS,
Attorneys for Appellant.

APPENDIX

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C.

September 30th, 1921.

I hereby certify that the annexed copy of office letter "F," W.P.J.—1907—140125, dated September 25, 1907, is a true and literal exemplification from the original on file in this office.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

GEO. R. WICKHAM,
Assistant Commissioner of the
General Land Office.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C.

"F"—1907—140125
W. P. J.

September 25, 1907.

ADDRESS ONLY THE COMMISSIONER OF THE GENERAL LAND OFFICE

In re relinquishment Santa Fe Pacific Railroad Company Act April 28, 1904.

The Honorable,

The Secretary of the Interior.

Sir:

Under date of August 21, 1905, the Department, acting on the recommendation of this office of the third of the same month, accepted and approved a relinquishment filed by the Santa Fe Pacific Railroad Company under the act of April 28, 1904 (33 Stat., 556), of certain lands therein described embraced in "small holding claims" in New Mexico.

Subsequently, upon re-examination by this office, it was ascertained that the relinquishment above referred to embraced some few tracts not subject to such relinquishment because embraced in private grants, and so not within the provisions of said act, and the company was, accordingly, advised of that fact.

Under date of the 14th ultimo the company filed in this office a new deed of relinquishment describing the same lands as in the original with the exception that it omits those lands found by this office to be embraced in private grants as aforesaid.

This latter relinquishment the company requests be accepted in lieu of the former which it asks be returned to it for cancellation.

I have examined the relinquishment last filed and finding that it conforms to the requirements of the Department in such cases recommend that the same be accepted and approved and that this office be authorized to return the original relinquishment to the company.

Both relinquishments are herewith transmitted, together with letter of the 14th ult., from Messrs. Britton and Gray, resident attorneys for the company.

Very respectfully,
R. A. BALLINGER,
Commissioner.

Approved Sept. 25, 1907.
G. W. WOODRUFF,
Acting Secretary.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C.

September 30th, 1921.

I hereby certify that the annexed copy of office letter "F," SSM, 198337, dated January 13, 1912, is a true and literal exemplification from the press copy of the said letter on file in this office.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this office

to be affixed, at the city of Washington, on the day and year above written.

GEO. R. WICKHAM,
Assistant Commissioner of the
General Land Office.

IN REPLY PLEASE REFER TO 198337. "F" SSM.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON

January 13, 1912.

ADDRESS ONLY THE COMMISSIONER OF THE GENERAL LAND OFFICE

Inclusion of mineral exception clause in patents to Santa Fe Pacific R.R. Co., under act of April 28, 1904.

The Secretary of the Interior,
Sir:

By act of July 27, 1866 (14 Stat., 292), Congress made a grant of lands to the Atlantic and Pacific Railroad Company, to aid in the construction of a railroad from the States of Missouri and Arkansas to the Pacific Coast, with a branch from the Canadian River to the Western boundary of Arkansas, at or near Van Buren. The Santa Fe Pacific Railroad Company became the successor of the Atlantic and Pacific Railroad Company under the provisions of the act of March 3, 1897 (29 Stat., 622).

By act of Congress approved April 28, 1904 (33 Stat., 556), it was provided:

> That the Atlantic and Pacific Railroad Company, its successors in interest and its or their assigns, may, when requested by the Secretary of the Interior so to do, relinquish or deed, as may be proper, to the United States any section or sections of its or their lands in the Territory of New Mexico the title to which was derived by said railroad company through the Act of Congress of July twenty-seventh, eighteen hundred and sixty-six, in aid of the construction of said railroad, any portion of which section is and has been occupied by any settler or settlers as a home or homestead by themselves or their predecessors in interest for a period of not less than twenty-five years next before the passage of this Act, and shall then be entitled to select in lieu thereof, and to have patented other sections of vacant public land of equal quality in said Territory, as may be agreed upon with the Secretary of the Interior.

Since the passage of this act, a number of requests have been made to the latter company for relinquishments of lands covered by the claims of small holding settlers, a number of such relinquishments have been filed, and selections in lieu of lands relinquished have been made and are pending in this office.

I am now in receipt of a letter from the attorneys for the company, of December 20, 1911, requesting that patents for lands so selected be issued to the company without the mineral exception clause which the Department, on April 22, 1911, directed

should be incorporated in all patents issued to railroad companies under grants which contain a provision excepting mineral lands, similar to that found in the grant of July 27, 1866, supra, which made grants to both the Southern Pacific and Atlantic and Pacific Railroad Companies, the contention being that the act of April 28, 1904, was neither a grant of lands nor an amendment of an act making a grant of lands, but merely authorized an exchange of lands already granted, and therefore not within the terms of the order.

The Act of April 28, 1904, authorized the railroad company, when requested to do so by the Secretary of the Interior, to relinquish certain lands within the Territory of New Mexico for the benefit of the small-holding claimants, and

> to select in lieu thereof and to have patented, other sections of such vacant public lands of *equal quality* in said Territory, as may be agreed upon with the Secretary of the Interior.

Before the company is requested to relinquish any tract of land, it is determined, by an examination of the records, that such tract passed under its grant, and selections in lieu of relinquished tracts, which are not restricted to the limits of the grant, but may be taken any where within the territory of New Mexico, are accompanied by affidavits showing the quality of the land relinquished, and that the selected land is vacant public land of equal quality therewith; and before any selected tract is listed for approval and patent, this

office has examinations made in the field, by special agents, of both the relinquished and the selected tracts, to determine their character and quality.

By decision of the Department of July 29, 1910 39 L. D., 135), it was held that the railway company, taking coal lands under its grant, by the Act of 1866, is authorized by the Act of April 28, 1904, to relinquish such lands and select other coal lands equal in value in lieu thereof, the following language being used:

> It will be seen by referring to the act of 1904, quoted above, that no mention is made of the mineral lands, nor are the settlers confined in terms to mineral lands. The act clearly authorizes the Atlantic and Pacific Railroad Company, or its successors in interest, to relinquish any lands acquired under its grant, upon which the Secretary of the Interior is authorized to issue a patent to such settler for the land held by him.

While patents issued to the company under the Act of 1904, recite that act and the acts of 1866 and 1897, aforesaid, it is the opinion of this office that the incorporation of the mineral exception in patents issued under the act of 1904, is not essential, but I enclose herewith the letter of the attorneys for the railway company, and request instructions in the matter.

Very respectfully,

FRED DENNETT,
Commissioner.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C.

September 30th, 1921.

I hereby certify that the annexed copy of letter 198337, dated March 4, 1912, is a true and literal exemplification from the original on file in this office.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

GEO. R. WICKHAM,
Assistant Commissioner of the
General Land Office.

DEPARTMENT OF THE INTERIOR,
WASHINGTON

ADDRESS ONLY
THE SECRETARY OF THE INTERIOR

March 4, 1912.

D-19005.

Inclusion of mineral exception clause in patents to Santa Fe R.R. Co.—Act April 28, 1904.

The Commissioner of the
General Land Office.

Sir:

Your letter of January 13, 1912, asking whether the mineral exception clause, directed by departmental order of April 22, 1911, to be inserted in

patents hereafter issued to railroad companies, for lands granted by acts of Congress containing provisions similar in effect to those contained in the grant to the Southern Pacific Railroad Company, should be inserted in patents issued to the Santa Fe Pacific Railroad Company for lands selected by it under the act of of April 28, 1904 (33 Stat., 556), in lieu of lands which passed to its predecessor, the Atlantic and Pacific Railroad Company, under the grant of July 27, 1866 (14 Stat., 292), has been received.

In the argument submitted on behalf of the railroad company it is contended that such a clause should not be inserted in the patents for the alleged reason that these lands are not either place or indemnity lands conveyed by grant, but are in the nature of an exchange, and that the act authorizing such exchange is in effect a contract into which terms and conditions can not be imposed by executive action. In support of this contention there is cited departmental decision in the case of Idaho v. Northern Pacific Railway Co. (37 L. D., 135).

Section three of the act of July 27, 1866, *supra*, granted to the Atlantic and Pacific Railroad Company—

> * * every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line * * *

The third proviso to said section is as follows:

> That all mineral lands be, and the same are hereby excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of said road and within twenty miles thereof may be selected as above provided.

The fourth proviso to the section is to the effect that the word "mineral" as used in the act shall not include coal or iron.

The language above set forth is similar to that of the grant to the Southern Pacific Railroad Company, referred to in departmental order of April 22, 1911, and as to selections pending within the granted or indemnity limits of the Atlantic and Pacific Railroad no doubt exists as to the applicability of said order. The act of April 28, 1904, supra, authorizes the railroad company to select in lieu of any section or sections of its granted lands which have been occupied by any settler as a home, for a period of not less than twenty-five years prior to the passage of the act, "other sections of vacant public land of equal quality in said territory as may be agreed upon with the Secretary of the Interior."

As above stated, the grant of lands both within place and indemnity limits specifically excepts lands containing minerals other than coal or iron,

and such deposits must therefore be held not to have passed to the company by or under its grant, but to have been reserved to the United States by the provisions of the act of July 27, 1866, *supra*.

From a supplemental report submitted by you it appears that the bases offered for pending selections by the company under the act in question 3,357.61 acres are lands which were patented April 27, 1909, the patents issued containing no "mineral exception" clause and that the remaining lands offered as bases, approximately 5,331.36 acres, have not been patented. Inasmuch as under existing orders the patents for the base lands, if issued, would be required to contain the so-called mineral exception clause, it follows that patents issued in lieu of such lands should, under the orders in question, contain the same. As to those lands heretofore patented without such condition expressed in the patent, the exchange being for lands of equal quality, the same terms and conditions should be imposed as in the original patents, and the addition of the clause making the mineral exception in the patents issued for lands taken in lieu thereof should not be made. You are therefore advised as follows:

(1) The mineral exception clause should be inserted in accordance with existing orders in all patents issued under the act of April 28, 1904, in lieu of base lands for which patents have not been issued, or for lands where patents issued containing the reservation in question.

(2) For lands selected under said act in lieu of lands heretofore patented and where the patents did not contain the reservation in question, the patents to be issued upon the lieu selection, need not contain said reservation.

The papers are returned herewith.

Very respectfully,

SAMUEL ADAMS,
First Assistant Secretary.